Supreme Court of the United States

OCTOBER TERM, A. D. 1907.

WHITE-SMITH MUSIC PUBLISHING CO.,
Complainant-Appellant.
vs.
APOLLO COMPANY,
Defendant-Appellee.
No. 110.

SAME
vs.
SAME.
No. 111.

Appeals From United States Circuit Court of Appeals,
Second Circuit.

BRIEF FOR APPELLEE.

TABLE OF AUTHORITIES.

UNITED STATES COURT CASES.

Amberg File Co. *v.* Shea..... 88
53 C. C. A., 449;
82 Fed., 314; } affirming;
78 Fed., 429.

American Mortgage Co. *v.* Hopper..... 138
64 Fed., 554.

Baker *v.* Selden.....99, 100, 102
101 U. S., 99.

Banks *v.* Manchester.....49, 51
128 U. S., 244, affirming;
23 Fed., 143.

Bleistein *v.* Donaldson..... 103
188 U. S., 239.

Bolles *v.* Outing Co..... 51
175 U. S., 268.

Brown *v.* Piper..... 134
91 U. S., 37.

Drury *v.* Ewing..... 101
1 Bond (Ohio), 540.

Edison Elec. Co. *v.* Sawyer & Man Co..... 128
53 Fed., 592.

Ewer *v.* Coxe..... 50
Fed. Cases, 4584;
4 Wash., C. C., 487.

Falk *v.* Engraving Co..... 104
54 Fed., 890, affirming;
48 Fed., 262.

Harper *v.* Shoppell..... 106
26 Fed., 519.

Harper *v.* Shoppell (app'l)..... 106
28 Fed., 613.

Higgins *v.* Keuffel.....54, 103
140 U. S., 428.

Hills & Co. *v.* Austrich. 60
120 Fed., 862.
Holmes *v.* Hurst. 50
174 U. S., 82, affirming;
80 Fed., 514;
76 Fed., 757.
Kennedy *v.* McTammany. 115, 135
36 L. Ed., 853;
33 Fed., 584;
145 U. S., 643.
Lawrence *v.* Dana. 75, 113
Fed. Cases, 8136;
4 Cliff., 1;
2 Am. L. T. R. (N. S.), 402;
7 O. G., 81.
Littleton *v.* Oliver Ditson Co. 57
67 Fed., 905, affirming;
62 Fed., 597.
National Folding Box Co. *v.* Robertson 132
99 Fed., 985.
National Harrow Co. *v.* Hench 131, 132
84 Fed., 227;
83 Fed., 36;
76 Fed., 667.
National Harrow Co. *v.* Quick 130
67 Fed., 130.
Oregon Ry. Co. *v.* Oregonian Ry. Co. 51
130 U. S., 1.
Osgood *v.* Aloe Inst. Co. 53
69 Fed., 291.
Perris *v.* Hexamer. 50, 113
99 U. S., 674.
Pierce & Bushnell *v.* Werckmeister 85
72 Fed., 54.
Postmaster *v.* Early. 164
25 U. S., 136.
Prince Mfg. Co. *v.* Prince's Metallic Paint Co. 127
135 N. Y., 24.

Rosenbach *v.* Dreyfuss. 102, 108
2 Fed., 217.

Straight *v.* National Harrow Co. 128
51 Fed., 819.

Schumacher *v.* Schwencke. 105
25 Fed., 466.

Schumacher *v.* Wogram. 105
35 Fed., 210.

Scoville *v.* Toland. 103
Fed Cases, 12,553;
6 West. Law J., 84;
Cox, Manual Trade-Mark Cas., 51.

Stern *v.* Rosey. 32, 114, 135
17 App. D. C., 562.

Stevens *v.* Cady. 112
55 U. S., 529.

Story *v.* Holcombe. 75
Fed. Cases, 13,497;
4 McLean, 306;
5 West. Law J., 145.

Stowe *v.* Thomas. 62, 69, 88, 99, 113
Fed. Cases, 13,514;
2 Wall. Jr., 547;
2 Am. Law Reg., 210;
1 Pitts. Rep., 82;
1 Pittsb. Leg. J., 129;
11 Leg. Int., 2;
2 Liv. Law Mag., 417.

The Madrid. 138
44 Fed., 467.

Tompkins *v,* Rankin. 55
Fed Cases, 14,090.

Thompson *v.* Hubbard. 49, 55
131 U. S., 123;
25 Fed., 188.

Werckmeister *v.* Am. Lith. Co. 54
117 Fed., 360.

Werckmeister *v.* Springer. 104
63 Fed., 808.
Wheaton *v.* Peters. 49, 167
Fed. Cases, 17,486;
33 U. S. (8 Pet.), 591.
Wood *v.* Abbot. 58
Fed. Cases, 17,938;
5 Blatchf., 325.
Worden *v.* Calif. Fig Syrup Co. 126
187 U. S., 517.

ENGLISH CASES.

Boosey *v.* Whight. 116
(1899) 1 Ch., 836;
80 L. T. R., 561;
15 T. L. R., 322.
Boosey *v.* Whight (App'l). 118
(1900) 1 Ch., 122;
81 L. T. R., 265;
16 T. L. R., 82.
Dicks *v.* Brooks. 77
15 Ch. D., 22;
43 L. T. R. (N. S.), 71.
Corbett *v.* Woodard. 100
L. R., 14 Eq., 407.
Hanfstaengl *v.* Baines. 76
(1895) A. C., 20;
72 L. T. R., 1.
Hanfstaengl *v.* Empire Palace. 76
63 L. J. R., Ch. 452;
63 L. J. R., Ch. 681;
(1894) 2 Chan., 1;
70 L. T. Rep., 459;
(1894) 3 Chan., 109.
Hollinrake *v.* Truswell. 110, 121
(1894) 3 Ch., 420;
71 L. T. Rep., 419;
68 L. T. Rep., 656.

Reade *v.* Conquest. 67, 68
9 C. B. (N. S.), 755;
11 C. B. (N. S.), 479;
30 L. J. Rep. (N. S.), C. P., 209.

Tinsley *v.* Lacey. 69
1 H. & M., 747;
32 L. J. Rep. (Ch.), 535.

Toole *v.* Young. 67, 68
(1874) L. R. 9, Q. B., 523.

Warne *v.* Seebohm. 71
39 Ch. D., 73;
58 L. T. Rep., 928.

West *v.* Francis. 119
5 B. & A., 743.

SYNOPTICAL INDEX OF BRIEF AND ARGUMENT.

STATEMENT. 1

OUTLINE OF FACTS. 2–5

OUTLINE OF ARGUMENT. 2–9

EVIDENCE EXAMINED. 9–49

Copyright sued on is sheet of staff notation. . . 9

Alleged infringement is perforated roll for automatic instrument. 9

Defendant is not the manufacturer. 9–10

Perforated rolls are interchangeable pieces of machines. 10–13

Perporated roll will not, without the mechanism, produce music. 13

Perforated roll, even with mechanism, will not produce music unless perfectly correlated to the mechanism. 14

Perforated rolls partly decipherable only with special templet which is index of the mechanism. 14–17

Perforated rolls when thus deciphered differ widely from staff notation. 17

Perforated roll not legible. 18–24

Appellants, who could easily have proven legibility if rolls were legible, produced no evidence of legibility. 24–30

Perforated rolls are never bought for reading 30

Perforated rolls were familiar when the present statute was enacted. 31

Other mechanical devices for automatic playing which infringe copyright if perforated rolls are infringement have been familiar for sixty years. 32
Sheet music publishersj find their business promoted by the sale of perforated rolls for the same music. 33–35
Retail dealers find sales of sheet music increased by sales of perforated rolls for same music. 36–39
Appellant has unlimited means of proving the facts upon the last two points, but offers no evidence to the contrary. 39–41
Complainant-appellant is only nominal party; real party is the Aeolian Company. 41–46
Aeolian Company does not come into equity with clean hands. It caused these suits to be brought and maintains them under contract with music publishers to effect a monopoly of industries not within copyright and obnoxious to equity. 47–49
DIRECT ARGUMENT ON LEGAL POINTS. 49–155
Copyright in the United States is strictly statutory. 49–50
Copyright statutes strictly construed in all respects. 50–77
As to formel requirements. 53–56
As to terms of defining subject-matter:
"Lithograph" and "book". 57
Photograph not "print". 58–60
"Stone" and "lithograph" construed strictly. 60

As to scope of legislative grant..... 61–77
Translations. 62–66
Playwright or public performance. 66–68
Dramatization. 68–75
Abridgement. 75
Transference from one art to another.. 75–77
Musical compositions subject to copyright are tangible, legible embodiments, not intangible intellectual product. 78–98
" Record," "musical notation" in lieu of the statutory word "copy". 80–85
"Copy" only one of the multiples not distinguished from the original. 85–87
All other subjects of copyrights are tangible. 87–89
Some results from complainant's theory.. 89–94
Usage of musical experts sustains tangible sense. 95–98
"Copies," to infringe, must be tangible embodiments in the same sense and for the same purpose as original copyrighted... 98–112
Primary use determines copyrightability and infringement; intention as to use is material; things intended for mechanical function not copyrightable nor infringement. 99-107
Incidental possibility of conveying information does not render device intended for mechanical use copyrightable or infringement. 107-112
Copyright protection consists only in a monopoly of a multiplication of copies.... 112

All judicial decisions in Great Britain and America hitherto have found perforated sheets, and the like, not infringement of copyright. 113–126
The real complainant, the Aeolian Company, does not come into equity with clean hands and therefore should be denied relief. 126–134
Present art of automatic instruments built up in reliance upon prior decisions which have established a rule of property and business and should be sustained under the rule of *stare decisis*. 134–148
The existence of the Berne convention and status of perforated rolls thereunder in foreign countries existing when the present copyright statute was enacted in 1891, precludes belief that Congress intended that law to cover these automatic devices. 148–155
POINTS IN REPLY. 157–173
Mode of making perforated rolls–by consulting staff notation–not pertinent. 157–158
As to special music not playable by hand. . . . 159–163
As to improvisations. 164–166
As to amendment of Section 4966. 166–169
Complainant's definition of "copy". 169–173

BRIEF AND ARGUMENT.

BRIEF AND ARGUMENT.

Supreme Court of the United States

OCTOBER TERM, 1907.

WHITE-SMITH MUSIC PUBLISHING CO.,
Complainant-Appellant.
vs.
APOLLO COMPANY,
Defendant-Appellee.
No. 110.

SAME
vs.
SAME.
No. 111.

Appeals From United States Circuit Court of Appeals,
Second Circuit.

BRIEF FOR APPELLEE.

STATEMENT.

The complainant-appellant in this court claims to own copyrights upon the two musical compositions which constitute the subject-matter of the two suits, respectively.

The defendant-appellee has sold, or offered for sale, in each case, a mechanical device consisting of a roll of paper having perforations making it a controller for an automatic musical instrument, or player for a keyed instrument, which, when put in place in such mechanism,

so controls the operation of the latter that the proper keys of the instrument will be struck to audibly produce, as it is alleged, the musical composition of which copyright is claimed.

The substantial question involved in both suits is: "Does the selling of this mechanical device infringe the copyright?"

OUTLINE OF FACTS.

1. The copyright sued on is for a piece of sheet music, printed in familiar staff notation.

2. The alleged infringement is a mechanical adjunct of a machine, consisting of a sheet, strip or roll of perforated paper prepared and designed for use as a controlling device of an automatic playing machine, and referred to variously as a "perforated roll," "perforated sheet," "music roll," "perforated music," "perforated music roll."

3. The defendant-appellee is not the manufacturer of the perforated rolls in question, but a retail dealer only.

4. Such perforated rolls or sheets are interchangeable pieces of a machine, and are made for no other purpose or use.

5. The perforated paper, called in respect to the mechanism of which it forms a part, the "controller," will not of itself, even in conjunction with a keyed instrument, cause the music to be sounded.

6. The perforated paper, even in conjunction with the remainder of the machine of which it is designed to serve as a part for controlling the action of the other parts, will not cause the music to be sounded unless the remainder of the mechanism is constructed in a particular way, properly correlated to the arrangement of the perforations of the sheet.

If associated with a machine for which it is mechanically fitted, but for which it is not adapted in respect to the arrangement of its perforations, it will cause notes to be sounded, but not the notes of the music in question.

7. Such perforated rolls are, to limited degree only, and in some instances only, and only imperfectly in the most favorable instances, decipherable by mechanical measurement or by applying thereto a templet or special scale made for the purpose, *which special scale must be in effect an index of the mechanism with which the roll is to be used.*

8. The rolls complained of differ widely from the copyrighted sheets when deciphered thus mechanically, by measurement.

9. No musician, so far as shown, has ever, to the present time, been found able to read the perforated roll for the purpose of singing or playing the music therefrom as from the printed sheet.

10. No one, so far as shown or as attempted to be shown, has ever purchased a perforated roll for the purpose of so reading it or learning to read it, or so playing from it.

11. Perforated rolls of this character and having the same purpose and the same general appearance and used in the same way were in more or less common use at the time of the enactment of the present revised copyright statute of 1873, and such rolls were in still more general use and were *well known* at the time of the amendment of the statute in 1891, and for several years prior had been the subject of definite international legislation.

12. Other mechanical elements for controlling the audible production of music by automatic instruments, such as the pin cylinders of music boxes and the corres-

ponding parts of barrel organs, which the complainant holds equally with the perforated sheet, are infringements of copyright on the printed music, have been familiar for sixty years.

13. Large numbers of publishers of sheet music consider it of advantage as tending to promote the popularity and increase the sale of such sheet music to have the perforated rolls cut for playing the music and offered for sale to users of automatic playing machines and musical instruments.

14. The experience of dealers in sheet music is that thus far the demand for and sale of sheet music is not diminished, but is, on the contrary, notably increased by the large sale of the perforated rolls for producing automatically the same music.

15. The complainants-appellants are, in a large sense, only nominal parties, the real party complainant and appellant being the Aeolian Company, a corporation which is by far the largest manufacturer and seller in this country, not only of the perforated sheets or "perforated music," so-called, but also of automatic musical instruments using such perforated rolls or controllers.

16. The Aeolian Company obligated itself to bring such a suit as this, and is in this suit as the real complainant, by virtue of contracts which it solicited and obtained with nearly all the large music publishers of the country, controlling a very large proportion of the valuable copyrighted music now in market.

17. The real complainant-appellant, the Aeolian Company, does not come into equity for the relief sought with *clean hands* on its own part; for it had devised the scheme involving the above mentioned contracts for the purpose thereby of prostituting a lawful copyright monopoly to

the purpose of producing an unlawful monopoly in a matter to which copyright does not relate,—namely, the automatic musical instruments,—and it brings these suits solely and expressly for the purpose of effectuating this unconscionable control of two entire industries.

OUTLINE OF ARGUMENT.

1. Copyright in the United States is strictly statutory.

2. The statutes creating and governing copyright must be, and always have been, rigidly construed in all respects.

3. The "musical composition" covered by the copyright laws is the concrete, tangible, legible expression of the intellectual product or musical ideas of the musician, and not the abstract or intangible intellectual product itself.

4. "Copies" which infringe a musical copyright must be tangible embodiments of the intellectual product of the composer in the same sense and for the same purpose as the tangible embodiment which constitutes the copyrighted musical composition.

(*a*) The *primary use* and adaptation of a thing determines its copyrightability or infringement of copyright.

(*b*) *Intention* to use is material and may be controlling in respect to copyrightability or infringement.

(*c*) Things intended for *mechanical function*—for use in themselves—will not infringe copyright, and are not copyrightable merely because of inci-

dentally being capable of performing some part of the function of things copyrightable.

(A) The monopoly conferred by copyright of musical compositions is not the monopoly of making the music heard.

(B) The concrete tangible presentation copyrighted does not include physical means of making the music heard.

(C) "Copies," of the making of which the monopoly is given by the copyright, do not include things which are merely means of making the music heard.

(D) That which imparts knowledge or perception of the music only by audibly producing it, is a musical instrument and not a copy of the music.

(E) The statute does not intend to give the composer a monopoly of making instruments to produce his music, even though individualized so that each such instrument plays only one piece of music, on the contrary,—

5. The protection designed to be afforded to the composer by a copyright on his musical composition is only the monopoly of the multiplying and selling of copies.

6. That perforated sheets and other mechanical means of automatically rendering music audible are not infringements of copyrights of musical compositions which they thus render audible, has been the conclusion of every court of England and America before which this question has ever come for decision.

7. The real equities of this case involve the real relations of the real parties.

The Aeolian Company is the real complainant, and its competitors in the manufacture of automatic musical in-

struments and controlling sheets for the same are the real defendants.

This real complainant does not come into equity with clean hands, for—

The scheme in pursuance of which these suits are brought involves as its logical and natural result, and must, therefore, be presumed to involve as its purpose, the creation of a monopoly foreign to the purpose of the copyright and involving two entire industries which the real complainant will dominate if these suits succeed.

Equity should refuse its aid to such an unconscienable scheme, especially when sought by the originator and beneficiary of the scheme.

8. Since the present art and business of automatic instrument manufacture has been developed during the period of the unbroken line of judicial decisions commencing January, 1888, declaring the freedom of these devices from the domination of copyrights, it will be presumed to have been built up in reliance upon these decisions.

Under such circumstances, these prior decisions, inasmuch as they have established a rule of property and of business, should be sustained under the doctrine of *stare decisis*, unless greater injury would result from sustaining them than from reversing them. The principle underlying *stare decisis* demands adherence to the prior decisions.

Their promulgation and their acceptance for a whole generation by the large interests concerned on both sides is a substantial fact bearing upon the equity.

(*a*) Prior to these decisions, the possibility of revenue from perforated rolls to composers by roy-

alty on their copyrights was not sufficient to constitute an appreciable element in the motive for obtaining copyrights.

Since the earliest of these decisions music copyrights have been taken out in view of the law as therein announced, and with the understanding, therefore, that the copyrights did not cover perforated rolls.

No injury or disappointment of revenue to composers will result, therefore, from sustaining these prior decisions, but by overruling them there will result vast injury to those who have relied upon them.

(*b*) The complainant's contention is not advanced on behalf of the composers, who will not benefit by the result which the complainant seeks, because these composers have already, with very few exceptions, parted with their copyrights to the publishers who have acquired them under the status of the former decisions, and therefore without taking into consideration any value which they might have as covering perforated rolls. In this phase, the complainants are prosecuting stale claims *which the prior decisions* gave them opportunity to acquire without consideration.

9. Each enactment of Congress is properly interpreted by reference to established public policy and the then known existing conditions.

At the time of the enactment of the copyright law of 1891, there were in force the provisions of the Berne Convention of 1886, binding, among others, Great Britain, Germany, France, Belgium, Switzerland and Italy to the proposition that "*the manufacture and sale of instru-*

ments serving to reproduce mechanically the airs of copyrighted music did not constitute infringement of copyright."

Although the United States was not a party to that Convention, the Act of 1891 was intended to be to a certain extent an international copyright law; and it provided for giving to citizens or subjects of foreign countries the same rights which United States citizens obtained by the laws of those foreign countries, the president to determine the fact by proclamation.

If the appellant's construction is given to this Act of 1891, it means that both the Congress which enacted that law, and President Harrison, who made the proclamations under it, intended to discriminate in favor of the foreign composer by compelling the people of the United States to pay him tribute on perforated rolls, while subjects of those foreign countries use perforated rolls of our composers free.

EVIDENCE AS TO FACTS.

1. The copyright sued on is a piece of sheet music printed in familiar staff notation.

(Appellant's Exhibit No. 5; copy of copyrighted music).

2. The alleged infringement is a piece of perforated paper in the customary form of roll for use as a controlling device of an automatic playing machine.

(Appellant's Exhibit No. 12; Record, page 34, Janson, Q. 10).

3. The defendant-appellee is not the manufac-

turer (publisher) of the perforated rolls in question, but retail dealer only.

(Record, p. 34; Janson, Q. 20).

4. Such perforated rolls or sheets are interchangeable pieces of machines and are made for no other purpose or use.

Hedgeland, Qs. 11-13, Record, p. 292:

"Q. 11. What is the function of a perforated sheet in a piano-player or self-playing instrument?

"A. To control the machine for which it is manufactured.

"Q. 12. How does it perform that function?

"A. By keeping the operating air ducts sealed until a note or notes is desired to be sounded, when by means of the perforations atmospheric pressure is admitted to the ducts, which in turn operates the pneumatic devices.

"Q. 13. Can a piece be produced by an automatic piano-player without the use of the perforated roll?

"A. Not without the use of a perforated roll or pin drum to act as controller."

(2) The whole of the following depositions:

Ernest G. Clark (Record, pp. 443-476);

F. W. Phillips (Record, pp. 489-503, and 511-518);

John H. Hughes (Record, pp. 566-581);

Frederick Hopkins (Record, pp. 596 to 603).

These depositions explain in detail the manufacture of the perforated rolls and account for the various peculiarities of such manufacture by reference to the purpose of the roll as a mechanical controller of the playing machine, and conclusively establish not only the sole purpose of the roll as being that stated, but also the practical impossibility of using the perforated sheet for any other pur-

pose, and specifically *the impossibility of using it for the purpose of reading the music as from the ordinary printed sheet.* No limited quotation from this testimony will serve to give the full or fair import, since its force in the respect indicated depends on the understanding it is calculated to cover of the progress of manufacture of the rolls in question.

This testimony has not been attacked, except to the extent that certain witnesses have testified to their ability to ascertain some elements or features of the music by applying measureing devices to the perforated sheet.

Page 107, Gunz:

> "Q. 29. Have you taken the defendant's perforated music sheets charged in this case to be infringements and compared them with the staff notations of the compositions to which they relate? If so, with what result?
>
> "A. I have made such comparison and found that the perforated record or notation of the defendant's music sheets agrees with the staff notation of the compositions in question."

Pages 124-125, Gunz:

> "X-Q. 87. How did you make the comparison stated in your answer to Q. 29, of the perforated music sheet charged in this case with infringement, with the staff notation of the compositions of which they are said to be infringements?
>
> "A. I made a templet which extended across a perforated sheet which showed the musical value of each perforation, and I also used a T-square, provided on its edges with marks corresponding to the centers or longitudinal axes of the perforations, and then I moved the perforated sheet under the templet or T-square and noted the musical value of the perforations and compared it with the musical value of the note indicators of the staff notation, and ascertained the normal length of the slots for the different time values, and compared the time values of

the notes with such normal lengths for the different notes of different time value."

Page 152, Young:

"X-Q. 28. To what extent have you ever experimented or made the attempt to thus play from a roll of an unfamiliar or unknown piece of music without previous examination of it?

"A. I have had in my possession but one roll marked in this way which I have tried to play on the piano; whether any other rolls have been made this way or not, I am not prepared to say, but the one offered in the exhibit I have tried and found that with comparatively little difficulty I could read it.

"X-Q. 29. This one marked roll, then, I understand, is the extent to which you have made the attempt?

"A. That is so.

"X-Q. 30. Your first step in that attempt was to mark the lines longitudinal and transverse which were to guide the eye of the person attempting to read it; am I correct?

"A. As stated in my answer to Q. 20, I said I caused the roll to be made, and at the time the direction was given to make such a roll the idea was not new, as I understand the Aeolian Company, or one of its employees, had applied for a patent for such marking.

"X-Q. 31. But when you made your attempt to read it, it had already the lines upon it as now?

"A. Yes, sir."

Page 154, Matty:

"X-Q. 7. Will you please produce the staff notation which you made, as you state in answer to Q. 4?

"A. I didn't write the music on staff notation; I made a templet of it, by which this can be done.

"X-Q. 8. You do not mean to imply, then, as your answer would seem to imply, that you actually made a staff notation of "Little Cotton Dolly"?

"A. No.

"R-D. Q. 9. What tests did you make with your templet on the piece entitled 'Little Cotton Dolly'?

"A. After I had made the templet, as I have described, I placed this upon the perforated music roll and read the notes off as I moved the T-square, with the markings on it, up along the roll."

But the testimony of these witnesses only emphasizes the fact that the perforated sheet is a piece of a machine, and that this resort may be made to it to ascertain whatever can be thus ascertained as to the music, *solely by virtue of the fact that, being a piece of a machine, the sounds which it will produce on a given machine are determinable from its shape.* That is to say, in so far as any information can be derived by the eye respecting the musical composition for which the perforated sheet is designed, the character of the machine to which it is adapted must be known and taken into account in the interpretation of the measurements which may be made of the positions and lengths of the slots of the perforated roll. *Its potentiality*—if in any instance it has any—*as a musical notation or as a record or evidence of the music intended to be produced, is an incident of its character as a piece of the machine,* **and of the character of the machine.**

See in this connection the testimony of Prof. Gerrit Smith, cited under point 6 (post).

5. The perforated paper, called in respect to the mechanism of which it forms a part the "controller," will not of itself, even in conjunction with a keyed instrument, cause the music to be sounded.

This is obvious and unquestioned. The paper is only a controller. It must be associated with a mechanism which controls in order to perform its function.

6. The perforated paper, even in conjunction with the remainder of the machine, will not cause the music to be sounded unless the remainder of the machine is constructed in a particular way, correlated to the arrangement of the perforations. If associated with a machine for which it is mechanically fitted but not adapted in respect to arrangement of perforations, it will cause notes to be sounded, but not those of the music in question.

This is most clearly brought out in the testimony of Mr. Gerrit Smith, Record, pages 384-386, in which Mr. Smith describes his experience with certain perforated rolls, each made for a differently constructed machine, but all adapted for playing the same pieces with these respective machines. But he describes how any one of the rolls placed in connection with any other of the machines than the one for which it was made produced unintelligible jargon; and states that the appearance of the several rolls made for their several machines, and made so as to produce upon them respectively the same music, was utterly different, so that no interpretation could by any possibility be derived by the most accurate measurement of the utmost details of the perforated roll *without first knowing and taking into account and including as an element in the calculations the structure of the particular playing machine of which the roll was intended to be a part.*

7. Such perforated rolls are, to a limited degree only, and in some instances only, and only imperfectly in the most favorable instances, decipherable by mechanical measurement, or applying thereto a templet or special scale made for the purpose, and

which must be an index of the mechanism with which the roll is to be used.

This can readily be understood from the testimony above cited of appellee's witnesses, Clark, Phillips and Hughes, and it is further corroborated by the testimony of appellant's expert witness, Mr. Gunz, above cited and commented upon, and by the following from his testimony, showing how, in order to make a plausible showing, he takes for deciphering a perforated roll cut for playing a march, with which he was familiar by ear.

Gunz, page 125, answer to X-Q. 88:

> ". . . In another case I started in with the perforated sheet, and from the same prepared the staff notation and then compared the staff notation which I made with a printed copy of the piece of music in staff notation.
>
> " X-Q. 89. By another case, what do you refer to?
>
> " A. I mean that I merely took perforated sheets and made a staff notation for my own amusement; it was not in another litigation.
>
> " X-Q. 90. You mean that you took another perforated roll of those which are charged to be infringements, and made the translation first independently of the staff notation and compared it afterwards?
>
> " A. I did make the staff notation first and compared it afterwards with the printed staff notation, but it was not one of the rolls here in suit; it was one of Sousa's marches.
>
> . . . . . .
>
> " X-Q. 93. To what extent were you familiar with Sousa's march which you translated into staff notation from the perforated roll, as you have stated?
>
> " A. I had heard the march before, but could not play it by heart, nor could I hum the melody, and I had never *before* seen the staff notation.
>
> " X-Q. 94. You were sufficiently familiar with it to recognize its various phrases as they occurred in

listening to it, so that in a common way it was familiar, but not familiar enough for you to play it without the score; is that about the fact?

"A. That is about right. I would recognize the march if I heard it played."

There is not a single attempt by any witness offered on behalf of the appellants to decipher the perforated rolls of even the comparatively simple music of the compositions directly in suit without the presence and assistance of the staff notation.

See the following testimony:

Gunz, page 124:

"X-Q. 88. Did you have the staff notation before you when you performed this process, and did you make your comparison from perforated sheet to staff notation as you went along, or did you first without the note sheet translate, or attempt to translate, the perforated sheet and then make the comparison of your translation with the staff notation of the composition as written by the composer?

"A. In the beginning of this comparison I compared note for note of the perforated sheet with the staff notation, and then later on, after I had become better acquainted with both *the staff notation of this particular piece* and the perforated sheet, I compared vertical lines or rows of notes in the staff notation with the transverse group of slots or perforations in the perforated sheet, and later on I compared measure by measure, the staff notation with the perforated sheet.

. . . . . .

"X-Q. 91. In your entire preparation of the translation into staff notation of the perforated roll in suit you had the original copyrighted staff notation before you for comparison, either note by note, measure by measure, or bar by bar, as you might find convenient, did you?

"A. Yes, sir.

"X-Q. 92. You were also familiar, were you not,

with the musical composition presented in the copyrighted staff notation before you began this process —before you proceeded far with it?

"A. I played it on the piano once, and also once on the Pianola, but I did not remember the melody."

Matty, page 154:

"R-D. Q. 10. How do you know that the perforations which you read by means of the templet were correct and represented the notes in this musical composition entitled 'Little Cotton Dolly'?

"A. After I had made the templet Mr. Gunz procured the sheet music, and while I read it off he compared it with the sheet music."

There is no attempt to meet in any respect the very explicit testimony of the defendant's witnesses, Clark, Phillips and Hughes, as to the impossibility of ascertaining by measurement the correct length of the notes. *This omission is very significant* in view of the fact that the appellant's employees include a very large number of the most expert music cutters and those most familiar with all the intricacies of the cutting of perforated rolls, and with all the considerations and limitations arising out of the construction of the automatic instruments for which the rolls were designed which might assist in interpreting the perforations. In view of the mere omissions of the appellants to produce witnesses upon this point, it is impossible to escape the conclusion that the facts are incontrovertibly as shown by the appellee's witnesses.

8. The rolls complained of differ widely from the perforated sheets when deciphered mechanically by measurement.

This fact appears clearly in the testimony above cited

from appellee's witnesses Phillips and Hughes, and from the schedule reproduced from their testimony. See pp. 21, 23 and 24 of this brief.

9. No musician, so far as shown, has ever to the present time been found able to read the perforated rolls for the purpose of singing and playing the music therefrom as from printed sheet.

The Circuit Court of Appeals thus expresses its conclusion on this point:

> "We are therefore of the opinion that a perforated paper roll, such as is manufactured by defendant, is not a copy of complainant's staff notation for the following reasons:
>
> "It is not a copy in fact; it is not designed to be read or actually used in reading music as the original staff notation is; and the claim that it may be read, which is practically disproved by the great preponderance of evidence, even if true, would establish merely a theory or possibility of use, as distinguished from an actual use." (Record, p. 490.)

A few of the direct statements of these witnesses upon the question of the possible legibility of the perforated rolls may serve as an index of the whole trend of their testimony, which, however, is greatly strengthened as to this point by the details into which they enter in certain parts too lengthy for quotation. Ernest G. Clark, Qs. 24 to 27, inclusive, Record, p. 303:

> "Q. 24. From your experience and familiarity with this work, do you not become sufficiently familiar with the place in the width of the sheet of the different notes so that you could locate them by eye without resorting to your graduated rule?
>
> "A. At no time have I ever been able to accurately place a note when testing or when correcting without the assistance of the rule.

"Q. 25. Are you accustomed to operating the piano-players with the perforated sheets controlling them to produce music?

"A. I am accustomed to playing the Apollo, i. e., more familiar with it, but I have operated one or two others of the players that are on the market.

"Q. 26. From your experience in operating these players with the perforated rolls, please state whether it is possible to acquire such familiarity with the rolls and with the positions of the apertures corresponding to different notes as to determine by inspection of the roll what note or notes particular apertures are designed to produce or cause to sound, or whether, in common phrase, it is possible to 'read' the notes by observing the apertures?

"A. From my past experience, I should say that it was not."

"Q. 27. You know a great many people who are accustomed to using these players, I assume. Have you ever found any one or known any one who could thus read the music to be produced from the perforated roll intended to produce it?

"A. No."

The non-legibility of the perforated rolls is substantiated not merely by testimony of witnesses, but by explanation of reasons which make it obvious why they must necessarily be substantially illegible. The above quoted testimony of witness Clark presents one reason, namely, that so far as determining the pitch of the notes by the location of the perforations on the sheet, the requirement is too exacting to be met, certainly by the ordinary ability of the human eye. The testimony of other witnesses shows the reason for non-legibility in respect to the relative duration or length of the notes, consisting in the fact that the lengths of perforations for notes which in the staff notation or ordinary score have the same time value, is very widely different, so that only within a limited range, and at best only approximately, and in very

many cases not even approximately, can the duration of the note be determined from the length of the perforations.

F. W. Phillips, Qs. 18 to 21, pp. 329-330, and Defendant's Exhibit "Phillips Schedule":

> "Q. 18. Are you familiar with the use of the Apollo player, using the perforated rolls?
>
> "A. Yes.
>
> "Q. 19. Does the use of the player executing music on the piano by means of it give one a familiarity with the location in the width of the sheet or roll of the slots corresponding to the respective notes which would enable him to ascertain the pitch by observing the position of the slot by eye?
>
> "A. No, sir.
>
> "Q. 20. Now with respect to the duration of the notes; please state whether the lengths of the slots in the perforated roll are proportionate to the indicated duration of the notes on the score of music written in the ordinary or staff notation, *i. e.*, whether all the slots for quarter notes are substantially the same length, and all the slots for eighth notes are substantially the same length, and half that of the quarter notes, etc.
>
> "A. No.
>
> "Q. 21. Will you give some illustrations of the variations in the length of the slots and the disproportion between those lengths and the duration of the notes on the score?"

In answer to this question, the witness gives a very long list of instances in which the discrepancies between the time value of the staff notation and the length of the slot are so great as to defeat any attempt at ascertaining the former from the latter. These answers are summarized in Defendant's Exhibit, Phillips' Schedule, as follows:

SLOT LENGTHS.

Slot No.	½ Notes.	¼ Notes.	⅛ Notes.	Trip. 8ths.	1/16 Notes.
1	...	...	10m	...	...
2	...	...	4m	...	...
3	...	...	...	...	8m
4	...	...	...	4m	...
5	...	...	3½m	...	...
6	...	...	10m	...	...
7	38m	...	...	...	...
8	...	4m	...	...	...
9	...	4m	...	...	...
10	...	...	11m	...	...
11	...	...	9m	...	...
12	...	...	3m	...	...
13	...	...	...	...	9m
14	...	...	3½m	...	...

The significance of the foregoing schedule in relation to the question of legibility of the perforated roll will be understood to be in that as to the duration of the notes the length of the slot is an utterly unreliable guide. The column of ⅛ notes best illustrates this fact, since it therein appears that the length of the slots, all of which are ⅛ notes, varies from 3½ millimeters to 11 millimeters. The same conclusion will be evident by comparison of the difierent columns, as, for example, quarter notes in the particular measures scheduled having such notes, being presented by slots four millimeters long, whereas the only half note contained in these measures instead of having the length of eight millimeters, corresponding to the ¼ note length, has a length of thirty-eight millimeters; and on the other hand, the two 1/16 notes contained in the measures scheduled have respectively slot lengths of eight millimeters and nine millimeters, while the two ¼ notes have a length of only four

millimeters, instead of sixteen or eighteen, as the 1/16-note slot lengths would indicate.

The same fact is clearly established also by the testimony of witness Hughes. (Record, pp. 375-380.)

The following schedules present the substance of answers 53 and 58 of this witness in the same manner as the schedule next to answer 21 of the witness Phillips presents the substance of that answer; and comparison of the lengths of the slots corresponding to similarly written notes in the sheet music show similar wide range of variation and similar absence of mathematical relation between the slots for notes which do in fact sustain definite mathematical relation to each other in respect to duration in the music; that is to say, slots for ¼ notes are not only widely variant in lengths in measures which are played at the same rate and still more widely variant in lengths in the piece as a whole; and slots for notes of other lengths are not proportioned to those lengths, nor can any law of relation be discovered by which, without knowledge of the written score, the true note-lengths could be derived from the slot-lengths, so that obviously even mechanical measurements with scales particularly adapted to the purpose and by persons having full knowledge of the construction of the playing machines for which the perforated rolls are designed, or even by persons familiar with all the intricacies and details of the process of cutting, would fail to reproduce from the perforated roll the staff notation of the music, which, nevertheless, the perforated roll upon the proper machine might be intended and adapted to reproduce with such degree of faithfulness as the nature of the case made it desirable or possible for the arranger of the perforated roll to undertake.

HUGHES' SCHEDULE ON 53RD ANSWER.

LITTLE COTTON DOLLY.

Slot No.	½ Note.	¼ Note.	Stac ¼ Note.	Trip. ⅛ Note.
1	..	..	10*	..
2	..	..	10	..
3	..	..	10	..
4	..	..	10	..
5	..	..	10	..
6	..	..	10	..
7	..	..	10	..
8	..	..	10	..
9	..	..	10	..
10	..	..	10	..
11	..	..	10	..
12	..	..	10	..
13	..	10*	..	..
14	..	10	..	..
15	..	10	..	..
16	..	10	..	..
17	..	22	..	..
18	..	..	..	..
19	..	..	..	..
20	..	..	..	..
21	..	..	..	7½*
22	..	..	..	29
23	..	..	..	5½
24	..	10	..	..
25	35*	..	..	..
26	..	21	..	..
27	..	12	..	..
28	..	9	..	..
29	..	23	..	..
30	..	18	..	..

HUGHES' SCHEDULE ON 58TH ANSWER.

KENTUCKY BABE.

Slot No.	Dotted ½ Note.	¼ Note.	⅛ Note.	Dotted ⅛ Note.
1	..	12	..	..
2	..	9	..	..
3	..	15	..	..
4	..	9	..	..
5	..	..	..	5*
6	..	..	..	5
7	..	..	..	6
8	..	..	..	8
9	..	14	..	..
10	..	9	..	..
11	..	14	..	..
12	..	9	..	..
13	..	..	..	6
14	..	..	..	6
15	..	15	..	..
16	..	6	..	..
17	..	6	..	..
18	..	6	..	..
19	..	14	..	..
20	..	..	2	..
21	32	..	..	..
22	..	15	..	..
23	..	6	..	..
24	..	18	..	..
25	..	6	..	..
32	..	16	..	..
34	..	..	..	6
35	..	..	..	9

Appellants could easily have proven the legibility of perforated rolls if they were in fact legible.

A number of appellant's witnesses, in answer to suggestive questions, expressed an opinion or conjecture as to the possibility of acquiring sufficient skill to be able to

read perforated rolls by eye; or, when answering categorically that such rolls are legible, have afterwards disclosed that they have no positive knowledge and will not personally attempt such reading.

Gow, pages 42 and 49:

"Q. 30. Would it require a great deal of practice on your part to reproduce musical compositions in the ordinary staff notation if first presented to you in the shape of perforated rolls like this Guilmant roll?

"A. It would take a very little while for me to become familiar with that method of reading music from this notation, and it could be reproduced in any other notation with which I was familiar.

. . . . . .

"X-Q. 72. Would you undertake to commence at any arbitrary point where I have marked opposite the syllable 'Cres.' a line and the letter 'A' on this perforated roll, to read the musical composition presented by the perforations, and to reproduce it in the ordinary form of notation?

"A. Not without a few days practice in such reading. It would take any man considerable time to learn to read any new notation, and it would take me less time to learn to read this notation than it would any notation with which I am not now familiar, but of which I have heard, since I am somewhat familiar with the appearance of this notation, although I have made no attempts to practice the reading of it apart from the performance upon an Orchestrelle.

"X-Q. 73. How long have you been using instruments in which these perforated rolls are employed, such as the Orchestrelle or any other of that general class?

"A. For three or four years.

"X-Q. 74. How frequently do you use them, or have you been using them during that time?

"A. During the college semesters three or four times a week."

DeKoven, page 59:

"Q. 8. I show you the defendant's perforated music roll, and I take it that you agree with me that a skilled musician cannot readily read the same, but with a little patience and application he can learn to read this form of notation just as he can learn any other form of notation?

"A. Certainly."

Pratt, page 69:

"Q. 9. Are these notations upon these perforated roll records a form of notation?

"A. I don't see why not.

"Q. 10. Can this form of notation be readily read?

"A. It is not customary to read it, but I don't see any difficulty about reading it if it was necessary."

Damrosch, page 75:

"X-Q. 17. .

"A. . . . The skilled musician mechanic of one of the mechanical instrument makers is able to read music from the roll of paper which he has perforated, but I as a musician who have not been skilled in that direction, would need the actual reproduction of the paper roll through an automatic self-player to enable me to hear or fix the composition so recorded in my mind.

"X-Q. 18. Do you speak according to personal knowledge of the fact, or only according to theory, when you say that the skilled musician mechanic is able to read music from the roll of paper which he has perforated?

"A. I speak from inference, that if he can reproduce music printed in the ordinary and hitherto popular form of musical notation, on paper which he perforated for that purpose, he must be able to read what he has written just as a stenographer can translate into ordinary orthography what he has written down in short hand.

"X-Q. 19. Do you know of any musician mechanic who is able to read the perforated rolls as stenographer reads his stenographic notes?

"A. I have never met any personally."

The query naturally arises,—why is the testimony of the appellant's witnesses upon this point limited to opinion and conjecture, or to unsupported assertion of a possibility which they are not shown to have ascertained? Why is there no positive testimony as to the fact, and ocular demonstration of the correctness of such testimony by actual reading of such perforated rolls?

Even if the complainant had not definitely and positively ascertained by inquiry or experiment before commencing the suit, the facts as to the ground upon which to a large extent it rested for maintaining its position, viz., the legibility of the perforated rolls by eye, still even after the commencement of the suit and during nearly two years, during which it was open for testimony, and before the testimony of Gow, Gunz, Matty, Pratt, De-Koven and Damrosch, above cited, were taken, the complainant was backed by the largest manufacturer of perforated rolls in the world, and one having on its staff the largest number of most expert arrangers, cutters, users, and,—if there could be such,—readers of these perforated rolls. With this unsurpassed opportunity for research and experiment, with a coalition of music publishers bound to it by the pecuniary interest which is manifested by the contract in evidence (printed Record, pp. 269-270), with every facility for finding out the facts, and unlimited means for obtaining testimony of those most expert in the reading of the perforated rolls (which it is contended can be read so readily as to make them a dangerous competitor of the printed sheet), what does the

record contain of evidence upon this point of legibility and fact?

One eminent instructor in music (McWhood) is venturesome enough to go beyond conjecture. He states that he uses the automatic players and their perforated rolls in his instruction, and declares,—rashly, as it afterward appears,—that he can read such perforated rolls. Being given opportunity to read a roll which he has not seen before, he spends twenty minutes with a measuring rule, and by means of diagrams, ruling the sheet longitudinally and vertically, measuring the spaces and counting the intervals; and in all this time and by all this mechanical effort, he ascertains, as he supposes, the notes of two chords, but is subsequently shown to be in error in every one of them. (Record, pp. 54-6, McWhood, X-Qs. 39-34; Record, pp. 308-10, E. G. Clark, Qs. 53-61), and be it noted, the error is not due to the fact that the record shown him was not constructed upon the principle upon which he assumed it was—that is, to be used upon an instrument having the ducts for the notes in regular chromatic order—but was due merely to his incapacity, or, it might fairly be said, to the approximate impossibility for ascertaining the notes even upon a correct theory; for he was in error in respect to every note *which the perforated roll would have produced upon an instrument of the construction for which he assumed it was made.* (E. G. Clark, 259-260, printed Record, pp. 309-10.)

Prof. Gow, whose testimony is above quoted, is an eminent teacher of music, as his deposition shows, and he evinces by argumentative testimony throughout, the strongest bias toward the complainant's position, but he is compelled to decline to attempt, "without a few days practice," the reading of a perforated roll shown him

for a piece of music which he had already heard; and this notwithstanding he confesses to having used perforated rolls in his instruction three or four times a week for three or four years.

Another witness, Mr. Gunz, probably the most expert in complainant's array, whose testimony bearing upon the point is too extended for quotation (Record, pp. 124-5, Gunz, X-Qs. 87-90), who might have been expected, at least nearly two years after the commencement of the suit, when testifying in rebuttal, to be able to state that not only he *could*, but *had* read, the particular perforated sheet complained of as infringement, and who undertakes to leave the impression that he has actually ascertained by ocular inspection of the perforated roll that it is an infringement in that it presents the music of the copyrighted sheet, upon cross-examination discloses that the utmost that he has been able to do—or, at least, that he claims to have done, in fact—is to measure with a rule the perforated sheet, *having before him the copyrighted music, so that he knows in respect to each slot of the perforated sheet just what note it should correspond to*, and by such measurement and comparison, note by note, to ascertain that the perforated sheet corresponds with the copyrighted music. (Record, pp. 124-5.)

Mr. Damrosch, whose testimony is above quoted, is undoubtedly one of the most widely informed musicians in the country, and the ease with which unsupported expressions, which are really only conjecture, not even entitled to the dignity of opinion, but which are made in the form of statements of fact, can be obtained even from persons of such cultivation, is evidenced by the unhesitating statement which he volunteers in his answer to Q. 17, above quoted, that "The skilled musician mechanic

of one of the mechanical instrument makers is able to read music from the roll of paper which he has perforated," though he is obliged to admit that he never knew a musician mechanic who could so read the rolls, and although, as above indicated, the complainant, with all its resources, has not been able to find one thus qualified.

10. No one, so far as known, or as attempted to be shown, has ever purchased a perforated roll for the purpose of reading it or learning to read it by eye.

If there were to be found anywhere a customer who was accustomed to purchase perforated rolls for the purpose of reading them, or who had ever in a single instance purchased a roll for that purpose, the appellant, as the seller of millions of these rolls each year, being in touch with musicians of every class, including teachers, who would have found out—if it pertained to these rolls—their value from readibility, would have found such person or persons, and would have been able to prove the fact of the purchase of rolls for the purpose of reading. There is no such witness, and one of the appellant's witnesses, Prof. Gow, who claims large familiarity with the music rolls and their uses, and who, being a teacher of music, uses them in his instructions, expressly admits that he never knew of an instance of the purchase of a perforated roll for the purpose of reading the music therefrom. (Record, pp. 49-50.)

> "X-Q. 79. You never bought any perforated music for the purpose of reading it as a musical notation, did you?
>
> "A. Certainly not.
>
> "X-Q. 80. Did you ever hear of anybody doing that?
>
> "A. Again, certainly not. . . ."

11. Perforated rolls of the same character as those here involved were in common use prior to the enactment of the revised copyright statute of 1873, and were in increased and familiar use at the time of the amendments of 1891.

That perforated sheets or rolls such as are involved in this controversy for controlling the operation of mechanical or automatic musical instruments, and having the same capacity,—or the same lack of capacity, as the case may be,—for conveying information through the eye—that is to say, of being read—were in common and more or less widely extended use prior to the enactment of the Copyright Statute as revised in 1873. Complainant's witness J. H. White, Record, page 62:

> "X-Q. 15. How much earlier than 1888 to your recollection were instruments using perforated sheets to control the production of musical tones known in this country?
>
> "A. Probably about twenty years prior to 1888.
>
> "X-Q. 16. Were not instruments of this general class introduced in use to a considerable extent, so that the perforated sheets for controlling them were familiar to the trade as early as 1886?
>
> "A. Yes, in a very small way, a very few instruments only being made at that time.
>
> "X-Q. 17. They had attracted wide attention and become quite generally familiar at 1890, had they not?
>
> "A. Yes, but the instruments at that time were very crude as compared with those of present manufacture, and were therefore not as satisfactory and as much sought after as they are the present day.
>
> "X-Q. 18. The instruments made at that time used the flexible or thin paper for perforation to make the perforated rolls, according to practically the same method and principle as those that are now almost universally used, did they not?
>
> "A. The general character of the paper used for

the perforated music is about the same as at that time, but of course improvements have been made in this, as in everything else; the principle, however, is the same.

"X-Q. 19. The rolls were removable interchangeable, that is, so as for any piece that one desired to play the proper roll could be substituted for any roll that might have been before on the instrument?

"A. The catalogue of perforated music at that time was very limited, but any roll shown in the catalogue could readily be used to operate the instrument and produce the effect desired."

12. Other mechanical elements for controlling the audible production of music by automatic instruments, such as the pin cylinders of music boxes and the corresponding parts of barrel organs, which the appellant holds equally with the perforated sheet are infringements of copyright on the printed music, have been familiar for sixty years.

These facts fully appear from testimony of appellee's witness Hedgeland (Record, p. 335, Q. 1) and the patents cited by him, contained at pp. 414-432 printed Record, showing them thirty years ago, and that they were at that time not new. See Needham patent, p. 414, wherein the patentee says (February, 1877):

> "I am aware that it is not new to use perforated paper sheets or plates to act as valves for musical instruments operated by wind."

And the court will probably take judicial notice (as was done by the court in *Stern* v. *Rosey* and in the British cases cited) of the use for at least two generations past of the music boxes having pin cylinders (and like structures of larger type classed as barrel organs, wherein the pins operate the reed valves instead of directly strik-

ing the reeds, as in the so-called "music boxes") and similar expedients operating in open view in the ordinary use of the instrument for automatically producing the particular tones or music for which the cylinders were respectively made. But this fact is stated in the record sufficiently to establish it. Record, pp. 298-299, Hedgeland:

> "A. [X-Q. 72.] They are mechanical records similar and identical in function with others that have been manufactured *for six decades.*"
>
> "R-D. Q. 75. In your answers to cross-questions 36 and 37 you say that automatically operated instruments date back very close to 1840. What classes of automatically operated instruments were in existence in 1840?
>
> "A. Barrel organs. I have read of them and seen very old samples called 'specimens.'
>
> "R-D. Q. 76. Your answers refer then to this barrel organ?
>
> "A. Yes."

13. Publishers of sheet music consider it desirable for promoting the popularity and sale of what they publish to have the same pieces cut in perforated rolls for players and automatic instruments.

F. W. Hedgeland, of the W. W. Kimball Company, says (answer to Q. 2, Record, pp. 335-6):

> "A. We have frequently received letters and copyrighted compositions with the request and permission to us to cut them in perforated form without asking any compensation therefor other than the advertising same would create. These requests have *come from composers and owners of copyrights.*"

Chas. H. Wagner, of the Melville Clark Piano Company (answers Qs. 2 to 6, Record, pp. 349-50) says:

> "A. Well, there are quite a number of piano

14. The effect of the sales of perforated rolls is to increase the demands for and sales of the sheet music of the same composition.

This is established by the affirmative testimony of appellee's witness Schleiffarth. (Qs. 3 to 5 inclusive, Record, pp. 319-20.) Mr. Schleiffarth says:

> "A. Ever since I have entered the market as a composer, wishing to gain as much popularity as possible, I have looked about how I could best obtain this popularity. Advertising in newspapers and by circulars and other advertising means I have found but little successful. In order to get my songs, songs especially, a hearing, so that the people would become acquainted with them and go to the publishers and buy a copy, I had to hire men or women to sing them in public. I consider the virtual and active sucesss in any musical composition the pounding it into the masses by letting them hear it, and this whether done by mouth or by whistling or through a graphophone or with a perforated roll on the street corner played by some blind woman, was my greatest wish and ambition. I consider that means for the composer used in that direction to get his music known, center in this one point, to have them played and made known to the public. Therefore, I do not see why the production of music played by the graphophone or by the so-called piano or music rolls (call them whatever you like) could be detrimental to the composer; and as the composer is anxious to be known, I have often asked my publishers to allow the reproduction of my composition on graphophones and self-playing devices.
>
> . . . . . .
>
> "A. As I am not in the sheet music business on such a scale that I could judge to what extent it has increased, I still claim from knowing the amount of music sold in the United States to-day, especially in the popular composition line, it is stimulated by all self-playing devices. For example, I would sit at a piano-player and play a catchy melody; six or eight

people standing around me will immediately ask—or some of them will—what is this tune you are playing, and I know from personal knowledge that many copies, especially of my own compositions, which are cut for self-players, have been bought in sheet-music form on account of my playing them on the machine."

Mr. Schleiffarth is a composer as well as a salesman, and his observation is from the standpoint of both composer and salesman.

Appellee's witness, Wm. McKinley, a large merchant of musical merchandise in Chicago, confirms the same conclusion from his own experience. Mr. McKinley says:

"Q. 6. During the period, say for the past three years, during which the manufacture and sale of these automatic players has been most rapidly increasing, what has been the fact with regard to the sales of sheet music, as to growth or diminution?

"A. My business has greatly increased.

"Q. 7. If you have made any examination with regard to the compositions which have been cut in perforated rolls and used in automatic players by the different companies making such players, as to the sales which have been made of these pieces in sheet music form during the period, say of the last three or four years, or since the time when they were cut in perforated rolls, will you state how the sales of such pieces have run? Have they increased or decreased during those years?

"A. My business has very greatly increased in certain pieces that I know are issued in the form of a perforated roll.

"Q. 8. Have you in mind—if so, you may state as near as you recall—the rate of increase of any number of those which you may have looked up and remember, giving their titles, if you recall them; and, if not, in general.

"A. The sales of some of the pieces have doubled within the last two years—double what they were for four years previous. I have traced up about 20

pieces of that sort to get these figures from which I stated the comparison above. I know when I desire to get new music for my family I call on the operator or performer of some of the stores that handle the music rolls. They often give me a list of the pieces. I usually purchase that. I have a list in my pocket of perhaps at least twenty pieces that I have been recommended to purchase. They have been recommended to me by one of the young men who has charge of that department—music rolls—in one of the stores; pieces I had never heard of before.

"Q. 9. I understand you mean by your last statement that the pieces that you are recommended to purchase are so recommended by persons who have opportunity to hear them played by means of the perforated rolls?

"A. Yes, sir."

Mr. Janson, music salesman, says (Record, pp. 373-4):

"Q. 49. Do you use the automatic piano-players themselves to any extent?

"A. Yes, sir.

"Q. 50. Do you also play the piano or other key instruments by hand?

"A. Yes, sir.

"Q. 51. Do you sing?

"A. Yes, sir.

"Q. 52. What, if any, is the effect of the use and opportunity for use of the automatic players and perforated rolls therewith upon your own purchases of and an inclination to purchase the music in the ordinary form of notation—that is, sheet music or other form for playing or singing without the use of the automatic players?

"A. In my personal case I have an Apollo at home and use the perforated rolls, and in several instances have purchased songs and instrumental music after having heard them played on the Apollo, for myself to play and sing, in addition to the Apollo.

"Q. 53. Have you had opportunities to observe the effect in this respect upon other purchasers and users of the Apollo or upon other persons hearing

the music played on the Apollo; I mean the effect, if any, to cause or prevent, increase or diminish their purchases of the sheet music in ordinary staff notation?

"A. In several instances, I know personally where people—owners of the Apollo—have purchased sheet music after hearing same on the Apollo.

"Q. 54. Is this a rare or common occurrence in your experience during your connection with the self-player business?

"A. It is a common occurrence."

Only "Opinions" to the Contrary.

In respect to this point, as in respect to the alleged legibility of the perforated rolls, the appellant was contented with asking the *opinion* of a few of its witnesses as to the *probable* effect of the sales of perforated rolls upon the sales of sheet music of the same composition. (Geibel, Q. 9, p. 58; DeKoven, Q. 9, p. 59; Finck, Q. 11, p. 65.) These witnesses are asked to indulge, and they freely do indulge, in long-drawn speculations as to what may *sometime* become the effect of the popularity of the perforated rolls upon the sales of the sheet music. They speculatively opine that the composer's royalities will be reduced by the increasing sale of the perforated rolls. One of their most eminent calculators in this line undertakes to fortify his speculations by reasons which are singularly inconclusive. Mr. Henry T. Finck, musical critic of the New York Evening Post, expresses his reason for anticipating the reduction of sale of sheet music from the introduction of the perforated roll at pages 65-6 of the Record, Q. 13.

The line of implied argument is obvious, but in cross-examination Mr. Finck admits that the development of musical taste resulting from the use of the perforated roll

will increase the desire for skill in manual performance upon an instrument, and it is conceded that for the purpose of manual performance the copyrighted staff notation would have to be purchased, and he therefore substanially sustains the conclusion that the increased use of the automatic instruments with the perforated sheets will increase the demand for staff notation as the increase in musical taste causes increased desire for skill in musical performance.

It needed no admissions or declarations by witness to enforce this conclusion. It is obvious upon the face of the facts.

Complainants have in their control unlimited evidence of the facts!

Their omission to produce any such evidence very significant.

But evidence that as a matter of fact the sales of the staff notation are falling off in respect to the music which is cut in the perforated rolls is *conspicuous by its absence.* This is peculiarly significant in view of the fact that the complainants have behind them a very large proportion of the music publishers of the country that this suit is confessedly prosecuted by the Aeolian Company, whose catalogues of perforated music comprise nearly everything that is cut in this form for any instrument; so that it was possible for the parties to this coalition, without going outside of their own books and records, without asking the assistance of a single witness not absolutely within their own control, to have produced the evidence which would have been conclusive one way or the other as to whether the sales of the sheet music for which perforated rolls have been marketed most largely have or have not fallen off during or immediately subsequent to such sales

of the perforated rolls. But with all this evidence in their hands, in their own records, absolutely within their own control, not a whisper does the record contain of the real facts except that which the defendants have been able to gather and introduce from the few sources accessible to them outside the great publishers' combine.

But from all these outside sources comes one unvarying testimony—to wit, that the indications thus far are clearly that the sale of the perforated rolls increases the demand for the sheet music, and that, therefore, instead of the poor composer being the victim he is the beneficiary of the perforated roll and automatic instrument demand.

15. The complainant-appellant is really only a nominal party, the Aeolian Company, the largest manufacturer and seller of perforated sheets of the character alleged to infringe the music copyrights, being the real complainant and having brought these suits in pursuance of contracts which it solicited and obtained with large numbers of music publishers controlling a very large proportion of valuable copyrighted music now in the market.

The actual relation of the Aeolian Company to the suits is substantially shown by contracts, of which specimen copies appear at pages 345 to 347, and concerning which it is stipulated at page 349 that similar agreements were made prior to the commencement of these suits, between the Aeolian Company and the White-Smith Music Publishing Company, the nominal complainant. It is furthermore expressly admitted and defended in the complainant's brief below, and doubtless will be similarly defended in brief of the appellant in this court.

That the Aeolian Company is a very large manufac-

turer of these perforated rolls of the character complained of in this suit is a matter of common knowledge and will not be questioned by the appellant.

That the contracts shown at pages 345-7 of the Record were solicited by the Aeolian Company may be clearly understood from their substance. The contract called "Document No. 1," page 345, is in form a license. "Document No. 2" refers to the contract "Document No. 1" of even date, and provides with respect to said license contract "Document No. 1," that—

> "No charge shall be exacted from, or be due from the Aeolian Company for the manufacture or sale by it, or any of its customers, of any of the perforated music sheets of either of the kinds aforesaid for playing any of the copyrighted musical compositions which are owned or controlled, or which shall hereafter be owned or controlled, in whole or in part, by the Publishers until a decision of the Court of Last Resort in a suit which is to be instituted against some manufacturer or user other than the Aeolian Company of such perforated music sheets for the purpose of testing the applicability of the United States copyright laws to such perforated music sheets, and not then unless such decision shall uphold the applicability of the United States copyright laws to perforated music sheets of the kind aforesaid."

It contains also the following very significant provision:

> "And it is mutually understood and agreed by and between the parties hereto that neither party hereto is to be obligated in any way by any of the provisions of this agreement, or of the aforesaid agreement of even date herewith, *until the Aeolian Company shall notify the Publisher that a number of copyright owners satisfactory to the Aeolian Company have made similar agreements with said company.*" (Italics ours.)

The clear intention thus manifested on the part of the

Aeolian Company to solicit such contracts until "a satisfactory number" should be obtained is confirmed by Document No. 3, which is the formal notice given to each of the contracting publishers that the satisfactory number of such contracts has been obtained. This Document No. 3 reads as follows:

> "Pursuant to the provision of an agreement granting us the exclusive right under your United States copyrights for all perforated music sheets intended for use in controlling automatic musical instruments and machines for playing musical instruments, we hereby notify you that a number of copyright owners satisfactory to us have made with us agreements similar to our agreement with you. From this date, therefore, our agreement goes into effect."

Now, bearing in mind that the Aeolian Company by these contracts undertakes to overturn if possible the doctrine established by the concurrent decisions of all the courts having passed upon the question, to the effect that copyrights on staff notation do not include within their scope the perforated rolls for controlling musical instruments, and to establish the contrary doctrine, to wit, that such perforated rolls do infringe the copyrights of musical compositions; and that the Aeolian Company, thus undertaking to subject perforated rolls to the domination of copyrights, is and has been for years a very large manufacturer of these now alleged to be infringing perforated rolls; and considering that the Aeolian Company is not a benevolent institution, but is in business for profit—**What will constitute a satisfactory number** of publishers contracting to give the Aeolian Company a monopoly of their copyrighted music for perforated rolls to warrant it (the Aeolian Company) in thus attacking the doctrine which protected it thus far against charge of in-

fringement and in proving itself liable as an infringer, and subject at least thenceforward to a royalty which would be an unbearable burden if imposed upon it alone, without offsetting advantage? Will the monopoly for perforated roll purposes of the copyrights of 5 or 10 or 20 per cent. of the desirable music be "satisfactory" to the Aeolian Company as an offset to the necessity for paying such royalty as its competitors may force it to pay for the other 95, 90 or 80 per cent. of the desirable music? In short, what pecuniary advantage could the Aeolian Company expect to derive from the establishment of the doctrine that would subject perforated sheets to royalty under music copyrights unless it could acquire so large monopoly of the copyrights desirable for that purpose that by virtue of that monopoly it could enforce a profit adequate to offset the royalty, not only on those of which it would thus acquire monopoly, but also on all the others on which it would not have monopoly, but on which it would still have to pay royalty?

Whether a monopoly of 50 per cent., or 40 per cent., or 30 per cent., or 20 per cent. of the copyrights upon music desirable for perforated rolls would be necessary in order to offset the disadvantage and burden of the royalties which would be exacted on a hundred per cent., this is certain — that whatever per cent. was **"satisfactory"** to the Aeolian Company, must have been a per cent. adequate to offset the burden.

It is also self-evident that the only advantage to the Aeolian Company of these contracts would be the quality of monopoly which it would thereby acquire to such extent as to enable it to dominate its competitors by that advantage. There is no other element of compensation or commercial justification for the undertaking to impose

upon itself a burden, and it must therefore be assumed when the Aeolian Company announces that a satisfactory number of publishers had signed the agreement that such number have signed as in view of the extent of their business and **the percentage of music compositions controlled by them is adequate to promise to the Aeolian Company a dominating monopoly.**

That this inference would be drawn from the face of the contracts and the other matter in the record concerning them was manifest, and it was absolutely in the power of the Aeolian Company, had it chosen to do so, to produce the evidence showing the contrary, if the inference was incorrect.

It has remained silent in the face of this obvious inference. Its silence must be counted against it in so far as the question of fact is material.

It has been suggested as tending to indicate that the percentage of music publishers involved in these Aeolian contracts is small; that a perforated roll maker, called as a witness by the defendant-appellee, stated that out of a certain forty letters which he sent out to music publishers soliciting them to furnish their music to him for cutting, five replied, indicating that they were barred from so doing by theAeolian contracts; and it was inimated that this ratio—five to forty—might be assumed to be the ratio of the music publishers who had made Aeolian contracts to the total number. That this inference is wholly unwarranted will be manifest from consideration of the fact that the perforated roll manufacturer in question had naturally all the information current in the trade with regard to the music publishers reputed to have made these contracts with the Aeolian Company, and that he would of certainty avoid sending his letters to those whom he

supposed had made these contracts, since in their cases it would be obviously fruitless. That he was mistaken in five cases out of forty is all that the record shows.

The responses evoked by the solicitation made by this witness, Holmes, for music to cut, incidentally indicates the common understanding in the music trade, of which, so far as it is material, and since it is not denied, though clearly apparent in the record, the court may perhaps not inappropriately take judicial notice. One of the five publisers who responded that he was barred by his contract with the Aeolian Company, significantly says (Record, p. 609):

> "The Aeolian Company, no doubt, have contracts with most of the other principal publishers. We understand that they have with all, having apparently cornered the market, and until things are decided, we hardly know where we are at."

This language from one af the contractees fairly suggests that the Aeolian Company has at least endeavored to impress upon these contractees that it has secured such contracts from a very large percentage of music publishers, or those controlling a very large percentage of the music.

> [NOTE: If this court can take judicial notice of the proceedings of the Congressional Committees on Patents mentioned in the Complainant's Petition for Certiorari, it is proper to add that in those proceedings the facts have been developed and conceded by the representatives of the Music Publishers' Association—the parties to said Aeolian contract—and that as the result of those proceedings it is now a matter of common knowledge that said Aeolian contracts, about eighty in number, comprise the publishers of at least 85 per cent. of current copyrighted music.]

16. The real complainant-appellant, the Aeolian Company, does not come into equity for the relief sought with clean hands on its own part. It brings these suits expressly for the purpose of effectuating its iniquitous scheme for prostituting lawful copyright monopoly to the production of an unlawful monopoly in automatic musical instruments and perforated rolls.

These contracts obligating the Aeolian Company to prosecute such a suit as this at bar, reward it, as above indicated, with the complete control of the copyrights of the contracting publishers; not only those subsisting at the time of the contract, but in addition all that the publishers may acquire for thirty-five years. Since copyrights run for twenty-eight years, with a possibility of extension for fourteen years in addtiion, it will be seen that the last acquired copyright subject to this contract would not expire for seventy-seven years from date of contract. The monopoly, however, would be complete for thirty-five years, and practically complete for at least half the ordinary term of copyright thereafter. It needs no imagination to predict the effect of such a monopoly extending through practically three generations, with all the advantage of increasing its grasp year by year, and taking in constantly a larger and larger percentage of music publishers and composers.

It is readily understood how this monopoly will operate. The manufacturer of perforated rolls who controls 50 per cent.—or even a less per cent., probably—of all the current copyrighted music, which he can refuse to sell except for playing on his own instruments, and who can sell his instruments with an accompanying notice that the purchase involves a restricted license to use it only with

the perforated rolls made by the seller, will be able readily to drive out of the market not only all other perforated rolls, *but all other instruments for using them*, because the purchaser of any other instrument would be unable to procure the perforated rolls for the large per cent. of desirable copyrighted music controlled by this monopoly.

In short, the Aeolian Company will have, under these contracts, all the qualities and dangerous powers of a monopoly which may be exercised to the enslavement of the art and business touched by it.

If the facts fully shown would in any respect diminish the probability of the evil results pointed out, the burden of proof of such facts was clearly upon the Aeolian Company, and its silence is fairly conclusive against it

These facts and considerations leave no room for doubt that the complainant brought these suits expressly to insure to itself a monopoly not involved in nor normally resulting from any monopoly which could lawfully be derived even by the consolidation of the multitude of copyrights under which it acquired license by its contracts, but a monopoly in two entirely different industries—namely, that of the manufacture of automatic musical instruments and that of the manufacture of perforated rolls—and that the prosecution of these suits by that company is the prearranged and essential step in this inequitable scheme of prostitution of the lawful copyright monopoly to the purpose of the unlawful musical instrument and perforated roll monopoly; and it is evident that a decision sustaining the appellant's contention in these suits would tend, by reason of this iniquitous scheme of the appellant, to ruin the large number of manufacturers now engaged in the business of making and selling automatic musical instruments and perforated rolls.

Equity must refuse its sanction to such iniquity, and whatever it might do in another case upon a plea of a different suitor, it must refuse assistance to this suitor, which comes here expressly for assistance in obtaining the fruits of its iniquitous contracts, but for which clearly it would **not have come to this or any other forum to have itself declared an infringer of copyrights, and the greatest of all such infringers.**

ARGUMENT UPON LEGAL POINTS.

I.

Copyright is strictly statutory in the United States.

Whatever may have been the rule in England prior to the statute of Ann as to the existence of a perpetual right of copyright in an author, two propositions are now established:

1. That if a common law right ever existed it was taken away by the statute of Ann, and that statute and those amendatory of it are now in England the only source of an author's right.

2. That there never existed any common law right of copyright in the United States; copyright in this country is the creature of statute pure and simple.

Wheaton v. *Peters*, 33 U. S., 591.
(664 quotation.)
Banks v. *Manchester*, 128 U. S., 244.
Thompson v. *Hubbard*, 131 U. S., 123.

Existing by virtue of statute only, the limitations of copyright are those which the statute fixes, or, more accurately speaking, its extent is only that which the statute gives.

Whether prior to the statute there was, or independent of the statute there would be, any natural right analogous to that which the statute has created and guarantees, it is bootless to discuss. From the enactment of the statute all common law right, if such existed, and from the invoking of the statute by the composer in claiming copyright or causing it to be claimed on his behalf, all equity, if equity before existed, with respect to the subject-matter, is surrendered, and the author or composer stands on the statutory right alone in respect to any monopoly which he may claim or any tribute or penalty which he may exact.

Ewer v. *Coxe*, Fed. cases 4584; 4 Wash. C. C., 487.

Holmes v. *Hurst*, 174 U. S., 82.

Perris v. *Hexamer*, 99 U. S., 674.

II.

The statutes creating and covering copy right must be strictly construed in all respects.

There are three classes of statutes to which it is the settled policy of our courts to give a strict construction, viz.:

1. Statutes which are in effect or which create legislative grants.

2. Statutes which are in derogation of the common law.

3. Statutes which are penal in their nature.

Whether a general copyright law to be construed, (1) as legislative grant of copyright to each individual who taking advantage thereof comes under its protection, or (2) as a general act giving to authors, etc., special

rights in derogation of the common law rights of the public, or (3) whether the Copyright Act of 1891 which contains penal provisions be construed as a penal statute, the conclusion must be the same, to wit, that the statute **must be strictly construed.**

Oregon Ry. Co. v. *Oregonian Ry. Co.*, 130 U. S., 1.

Banks v. *Manchester*, 128 U. S., 244.

Bolles v. *Outing Co.*, 175 U. S., 268.

Although not all the provisions of the copyright statute are penal in their nature, yet since it contains penal provisions, and since these penal provisious must be strictly construed, not only (*a*) in respect to the penalty, but (*b*) in respect to the act by which the penalty may be incurred, and therefore (*c*) in respect to the right trespassed upon by the act, that is to say, in all respects involved in the penal section:

And since the statute must be construed consistently throughout, the same terms having the same force and meaning in the different sections.

It unavoidably follows that the strictness of construction required by the penal sections by reason of their penal character must pertain also to all the sections in which like terms defining the right or defining the act which will infringe the right, are used,—for example, in Section 4965, which is held to be a penal section (Appendix, p.), the words "musical composition," "copy," "publish," "copied," "published," must be strictly construed with precisely the same meaning as is given to them in construing Sec. 4952, which grants the right.

Departure from this rule of strict construction cannot be justified on the ground of extending the statute by analogy from things expressed, to things thought to be

similar; or from rights named and defined in respect to named subjects, to analogous rights in respect to subjects thought to be analogous.

All authorities which may be cited in supposed support of such contention will be found upon examination to involve either (*a*) the interpretation of statutes enacted to protect a natural or common law right, or (*b*) the application of a legal principle which is the outgrowth of judicial decisions in particular cases.

Such statutes are construed liberally to the end for which they are enacted—the protection of the natural or common law right. Such legal principles will be extended in the exercise of the same judicial wisdom in which they had their birth, to reach and include analogous cases new only in the circumstances or phases in which the development of civilization and art causes them to arise.

But such liberality of construction in one case and extensions of judicial principles beyond their original territory into new territory, so to speak, along the lines of their extent in the old territory, constitute no foundation for the argument for the extension of *rights strictly statutory* along lines supposedly analogous and by reason of such analogy.

As the legislature alone created the right and set its bounds in the first instance, so the legislature may as civilization and art develop and as the considerations governing legislative discretion change, extend or contract those bounds from year to year and from generation to generation, but as the creation of the right waited, so the extension, as much as its contraction, *must wait upon the legislative act*.

If the invention of automatic musical instruments and the graphophone have opened new fields and methods for

the exploitation, promulgation, or what may be called "publication" of musical compositions which did not exist or were not in contemplation of the legislature when the present statutes were enacted, and if authors and composers deem themselves reasonably entitled to have their monopoly over their products extended into these new fields, it is competent for the legislature, within the limits of the Constitution, taking into consideration all the facts and the interets of the public, as well as the supposed rights of the author, to extend or to refuse to extend the monopoly of the latter. It is not for the courts to enter the domain of legislation to weigh the considerations either of equity or expediency which might move for or against such proposed extensions; and all arguments directed to the supposed reasonableness of treating copyright as covering automatic means of audible reproduciton of speech and music are utterly irrelevant and beside the question.

AS TO FORMAL REQUIREMENTS.

The first class of cases in which this rule of strict construction is manifested consists of cases involving questions relating to the formal requirements for obtaining and preserving copyright. The following are typical:

Osgood v. *Aloe Instrument Co.*, 69 Fed., 291. Notice of copyright printed upon the published book in all respects in conformity to the statute except that the name of the party by whom entered is not annexed to the remainder of the notice, but appears on the same page as a publisher, held insufficient, and copyright defeated by this discrepancy or variation from the statutory requirement.

lished the work with proper statutory notice in all copies thereof. He subsequently sold the plates with the copyright, and the purchaser published the work with the defective notice. The original copyright owner thereupon republished it in disregard of the copyright and his sale and assignment thereof, and was held *not liable as an infringer*, by reason of the *defective notice* in the edition published *by his assignee*.

It is evident that the Supreme Court, in the language above quoted from the decision, intended to account for the complete ignoring of equitable considerations in this decision, on the ground, so distinctly announced, that the statute is to be construed rigidly as the only source of the right, and its conditions as the only means of protecting that right, so that even the absolutely conclusive notice which as *original owner* the seller of the copyright had of the existence of that right, *is as nothing in the face of the omission by the purchaser to print the notice in the manner prescribed by the statute, on the title-page of the book*.

AS TO TERMS DEFINING SUBJECT-MATTER OF COPYRIGHT.

A second class of cases in which the rule of strict construction of the statute is applied in view of the strictly statutory character of the right consists of those involving questions as to the classes of subject-matter which may obtain copyright protection and the application of the statutory terms or conditions to the different classes; and the question whether the definitions of or limitations as to subject-matter are to be treated as flexible or as subject to extension in any direction. The following cases are significant.

"LITHOGRAPH" AND "BOOK" CONSTRUED STRICTLY.

In *Littleton* v. *Oliver Ditson Co.*, 62 Fed., 597, affirmed by Circuit Court of Appeals, First Circuit, 67 Fed., 905, the description of class of things copyrightable is held subject to a construction strict and rigid beyond any rule which could possibly arise from the idea of the statutory protection as being afforded in support of a natural right, or one entitled to be regarded from the point of view of equity. In this case, Sec. 4956 of the Copyright Act, as amended March 3, 1891, was under review in respect to the provision that:

> "In the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited as above, shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives or drawings on stone made within the limits of the United States, of from transfers therefrom."

And it was held that the word "book" in this section of the statute could not include a musical composition, *although printed in book form*, and that the word "lithograph," in the same section, could not include such musical composition, although made by the lithographic process.

In affirming this decision the Circuit Court of Appeals declined even to examine the proceedings in Congress upon the enactment of the amendment section, but declared that the conclusion was unavoidable upon the face of the statute from the language employed, because the statute enumerating among the subjects of copyright "book" and also "musical composition," the two terms must be mutually exclusive.

The deduction which appellant draws from this decision that "musical composition" is distinguished from

"book" by the requirement that the book *shall be printed* from type set within the limits of the United States, etc., and that the musical composition is excluded because it is intangible and could not be defined by method of printing, is wholly unwarranted and even fanciful, as a careful reading of the decision will show.

PHOTOGRAPHIC PRINT HELD NOT A "PRINT."

In *Wood* v. *Abbott*, Fed. Cases, 17,938, in the Second Circuit, it was held that a photographic print is not a "print," "cut" or "engraving" within the meaning of the statute, although the same word, "print," is commonly applied to it; the court holding that the word "print" is to be taken in the strict sense in which it was probably understood at the time of the enactment as appropriate to a reproduction by pressure as in printing commonly known at that time. The identity of name was regarded by the court as inconsequential; the identity of result was held equally inconsequential. The fact that the advance in the arts after the enactment of the statute, brought into use a new method of multiplication of facsimiles, was not considered ground for extending the statute to include this new method, or this new sort of facsimile, even though its identity in general character was manifested by the identity of name commonly applied, bringing it within the literal terms of the statute. Thus the power of the courts to project the statute forward into new territory over new areas opened by discoveries or inventions subsequent to the statute is denied, even though such projection may readily be made along the verbal lines of the statute.

If this decision was correct the contention that the copyright on musical composition covers perforated rolls involves this dilemma:

Either Congress *did* know of the perforated roll when the statute was enacted or it *did not* know of it.

If Congress *did* know of it, the absence from the statute of any terms fitly applicable to it argues conclusively intention *not* to include it under the statute.

If Congress *did not* know of it, then it was unknown in the same sense as the photographic print, and under the decision *Wood* v. *Abbott*, the statute cannot cover it.

In either case it is beyond the protection of the statute.

But it will be evident that if the principle contended for by the complainants is allowed, the pin cylinder of the music box and the barrel of the barrel organ are just as clearly within the scope of the copyright as the perforated roll. But these devices were very familiar long before the enactment of revised copyright statute, and if it had been the intention of the legislature to authorize musical composer to monopolize these old and familiar means of "recording" his compositions, *it is incredible that language should not have been chosen which would be naturally applicable to these well-known things.*

But it may be said that the perforated roll is so marked an advance over the pin cylinder or the barrel of the barrel organ in respect to its capacity for reproducing the music, and also, and particularly in respect to the possibility of deciphering it so as to ascertain from it the music without using it to reproduce the same audibly, that it is like a new art—like a thing unknown, from this point of view, to the legislators in 1874; and that even as compared with the condition of knowledge in 1891, the more widely extended use which has since obtained, has so developed the capacity, or has so proven the possibility of deciphering, or, as it may be loosely termed, "reading the perforated rolls," that from this point of view, so far

as the knowledge or apprehension of their character is concerned, they constitute a new art since 1891.

If this were granted it would only follow that the doctrine of *Wood* v. *Abbott* would apply strictly and perfectly, and that *even though this perforated roll were found to be within the phrase of the statute of 1891*, yet since its capacity for being used in the manner in which it is contended (but not proven) that it may be used, was at that time substantially unknown, *it is in respect to this capacity a new art*, or a newly developed thing, not to be considered as having been known to the legislature in 1891; and that statute, therefore, is not to be stretched, nor even allowed its full possible interpretation, so as to include that which, by hypothesis, was unknown to and therefore not within the intent of the legislature at that enactment.

"STONE" CONSTRUED STRICTLY.

In *Hills* v. *Austrich*, 120 Fed., 62, in the Second Circuit, it was held that a picture printed in successive colors from *metal* plates does not fall within the description of Section 4956 of the Copyright Statute, which provides that—

> "in the case of a book, *photograph*, *chromo*, or *lithograph*, the two copies of the same required to be delivered or deposited shall be printed from type set within the limits of the United States or from plates made therefrom, or from negatives or drawings on stone made within the limits of the United States."

It would certainly have required a minimum amount of judicial discretion to decide in this case that inasmuch as since the enactment of the section of statute under review the art of printing in colors had advanced so that works of the character of lithographs as to appearance

were not made from engravings on stone, as implied from the word "lithograph," but from engravings on metal, the phrase of the Section, "from negatives or drawings on stone made within the limits of the United States," should be construed liberally as if instead of the word "stone" a word sufficiently generic to include metal had been employed, but the court found itself without discretion in the premises because construing a statute respecting a right strictly statutory.

AS TO THE SCOPE OF THE LEGISLATIVE GRANT.

The third class of cases in which the rule of strict construction of the statute is applied and the statutory right held limited in respect to the scope of the monopoly created, consists of those in which contention has been made for the judicial extension of the monopoly so as to include *collateral, secondary* or *derived* presentations or embodiments of the intellectual product, and in which the right has been held not extensible, but on the contrary, limited to the *multiplication of copies.*

Such secondary or derived embodiments or presentations include:

1. Translations.
2. Public performance.
3. Dramatizations.
4. Abridgements.
5. Embodiments of the substantive thought or idea of a work of art of one class, such as painting, in a work of art in another class, tableaux, wax miniatures, or *vice versa.*

Translation Is Not Copy.

In the early case of *Stowe* v. *Thomas*, Fed. Cases 13,554 to Wall., Jr., 547 (1853), the conclusion was reached which has been universally accepted and followed by the United States courts ever since, that the *monopoly of translation does not flow from the mere copyright in the absence of express provision of the statute* (which did not exist at that time).

Though criticised by text-writers and theorists, that decision has never been cited otherwise than approvingly by the courts, and its acceptance as expressing the true doctrine of law is manifested by the subsequent amendments of the statute reaching *toward*, but never reaching *to*, the result which that decision held beyond the original scope—of making the copyright directly and of its own force—cover translations as copies. The terms of the statute identifying and describing an act, process or product which is the subject of the monopoly created by it are in this decision held to be subject to the most rigid and strict construction.

Mrs. Harriet Beecher Stowe had translated her novel, "Uncle Tom's Cabin," into German, and had published that translation, but had not copyrighted the German publication. Relying upon the original copyright of the novel in English, she brought suit to restrain the publication of an independent German translation.

The learned Justice Grier (of the U. S. Supreme Court, sitting in the Circuit Court), interpreting the word "copy" in the statute, says:

> "A copy of the book must therefore have a transcript of the language in which the conceptions of the author are clothed—of something printed and embodied in tangible shape. The same conceptions

> clothed in another language cannot constitute the same composition, nor can it be called a transcript or copy of the same book . . . But as the author's exclusive property in a literary composition, or his 'copyright' consists only in a right to multiple copies of his book and enjoy the products thereof, and not in an exclusive right to his conceptions and inventions which may be termed the 'essence' of his composition, the argument from the supposed analogy (that of inventions) is fatal. . . . A translation may, in loose paraphrase, be called a 'transcript' or 'copy' of her (the author's) thoughs or conceptions, but in no correct sense can it be called a 'copy' of her book."

It has been suggested by appellant's counsel in the arguments below that the amendment of the copyright law by Gongress after the promulgation of Justice Grier's decision in the above case was intended to be declaratory of the real meaning of the original statute, and of the fact that it included translations as copies.

That this was not the fact may be clearly seen upon considering what was the actual amendment.

The decision was rendered in 1853. The first amendment to the copyright statute which touched upon translations was in the Revised Copyright Act of 1870. In the meantime two amendments had been made, each of which may fairly be taken as indicating that the principle of Judge Grier was recognized as correct. The first of these was in 1856, and expressly adds to the scope of copyright of a dramatic composition the monopoly of performance. The second was in 1865 and expressly adds to the subject-matter of copyright, photographs and negatives, which had in the meantime been held not included within the term "print." (These points are further noticed later.) But in the Copyright Act of 1870, seventeen years after Justice Grier's decision, during which time no contrary

view of the statute had been expressed at any time by the United States courts, the matter of translation rights is definitely noticed.

If Congress had regarded the decisions of Justice Grier in the suit of *Stowe* v. *Thomas* as putting upon the statute a construction not intended in its enactment, and had even after the long delay of seventeen years desired to cure the inadvertence of the statute by virtue of which it was thus misconstrued by the courts, or, as intimated by counsel, had desired to make the new statute declaratory of the intention and meaning of the old as including translations as copies, the simple and obvious amendment for this purpose would have consisted in merely inserting the word "translating" where it appears in brackets in the following clause of the statute:

> "the sole liberty of printing, reprinting, completing, copying, executing, finishing [translating] and vending the same."

In such form the meaning would be unmistakable and precisely what counsel intimates was the intention; and so perfectly obvious a mode of expressing this intention could not have been overlooked.

But, instead, the copyright statute of 1870, *not including translating in the list of acts within the monopoly of copyright*, adds to Sec. 4952 the following:

> " And authors may reserve the right to dramatize or translate their own works."

Thus, whatever Congress intended in the statute of 1831, in force at the time of Judge Grier's decision, it clearly appears that, with that notable decision standing as the only judicial pronouncement upon the former statute in this respect, it did not intend, by the statute of 1870, to enact that the copyrighting of a book should pre-

vent others than the author from publishing a translation of it *unless the author expressly "reserved" to himself that right of translation,* and such reservation was expressed in the notice of copyright on the original work. It is obvious how far short this falls of making copyright cover translations.

But Congress had opportunity again to reconsider the position and to decide whether an original copyright should cover translations. And in the revision of the copyright statute by the Act of 1891 the above quoted clause of the Act of 1870 was substituted by the following:

> "And authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States."

In view of the preceding history of these provisions and decisions with respect to translation, this language is exceedingly significant. The preceding portion of the section contains (*a*) a list of the subject-matter or things which may be copyrighted, and (*b*) a list of the acts or functions which shall comprise the monopoly of copyright, as "printing, reprinting, completing, copying, executing, finishing and vending" (not including translating), and adding:

> "and in the case of a dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others."

If it had been the intention of the legislature to include in the acts or processes constituting the monopoly, the dramatization and translation (of works susceptible of these processes), the perfectly obvious, and it would seem unavoidable, method would have been to insert the words "dramatizing" and "translating" in the list contain-

ing the words "printing, reprinting, publishing, completing, copying, executing, finishing and vending." But apparently it was not intended to add "translating" and "dramatizing" to this list (which would have caused these rights to pass with the mere assignment of the copyright, so that not the author of a novel, if he has sold the copyright, but the publisher, having bought the copyright, would have had the right of dramatizing and the right of translating). Apparently to prevent this result inconsistent with the natural rights of an author, the statute proceeds to give to the **author,**—as distinguished from the **owner of the copyright,**– if the author assigns the latter, the exclusive right of dramatizing and of translating, this right being not a part of the copyright itself, but a right flowing out of it *to the author as author,* and conditioned upon the existence of the copyright having been obtained, but not upon its being owned by the author.

Thus it appears that so far from having been at variance with Justice Grier's decision and desiring to declare or make the statute to the contrary thereof, Congress has by two amendments indicated unwillingness to extend the scope of copyright so as to make it directly include monopoly of translation; and by each amendment it has emphasized the limitations of the original statute as not including such monopoly.

(1) Playright or Monopoly of Public Performance.

Uniformly, this monopoly has been denied as a right flowing from copyright. Public performance is not a multiplication of copies. See Drone on Copyrights, p. 91, citing U. S. Statutes and English decisions.

Among the latter, the following are significant:

Toole v. *Young*, L. R., 9, Q. B., 523. The facts in this case were that the complainant having written, published and copyrighted a novel subsequently dramatized it, but did not publish nor copyright the dramatization, nor cause it to be publicly performed. Later, the defendant, not knowing of the author's dramatization, independently dramatized it and caused public performance. The action was for damages and accounting for the profits of the public performance. The court apparently found it necessary to consider whether the dramatization, as distinguished from the public performance, was a violation of the copyright, and the views of the court upon this point are pertinent and quoted in another connection, but upon the main point,—whether the public performance was a violation of the copyright and entitled the copyright owner to damages, Chief Justice Cockburn, in rendering the decision, said:

> "The author of a drama is not protected by the common law, and what the defendant has done is not forbidden by any statute."

Justice Blackburn, also concurring in the decision, announced the same conclusion, saying:

> "According to the decision in *Reade* v. *Conquest*, which seems to me to be perfectly right, Mr. Holingshead, the author of the copyrighted novel, merely acquired the right to restrain persons from printing, publishing or otherwise multiplying copies of his novel."

Reade v. *Conquest*, 9 C. B. N. S., 755, 31 L. J. (C. P.), 153. This was a suit at law for accounting and damages for alleged infringement of copyright on a novel. The second count of the

declaration alleged that the plaintiff was the duly registered proprietor of the copyright in a certain registered work, viz., "A tale, novel or story entitled 'It is never too late to mend,'" and complained that the defendant, without the plaintiff's consent, dramatized said novel and caused it to be publicly represented and performed as a drama.

There were thus raised two distinct issues: (*a*) whether dramatization was infringement; (*b*) whether public performance for profit was infringement.

The defendant demurred to this count. Judgment was rendered for the defendant upon the demurrer. The court expressly held that neither the dramatization nor the performance or public representation of such dramatization, nor both together, constitute infringement on the copyright of the novel.

This case has ever since been the leading and conclusive authority in Great Britain upon both these points.

Monopoly of Dramatization.

This is not multiplication of copies and is not included in the monopoly conferred by the general provisions of the copyright statute in the absence of, or prior to, the express provisions mentioning it.

Reade v. *Conquest*, cited above, is the leading and unquestioned authority for this proposition in Great Britain.

In *Toole* v. *Young*, above cited (1874), the point was amplified.

The facts are stated above. Chief Justice Colburn, in his decision upon this point, takes occasion to say:

"*Reade* v. *Conquest* established the proposition

that an author has a right to convert a novel *written by another person* into a drama without infringing the copyright existing in the novel. (Italics ours.)

"When an author has once given his novel to the world, he cannot take away from other persons the right to dramatize it by transforming it into a drama, subject to this—that they must not borrow from his drama but only from his novel."

Justice Blackburn, upon the same point, following the language above quoted, adds:

"And however shabby and discreditable it may seem, any person has the right to dramatize the novel without being liable to an action on the ground Mr. Holingshead had the copyright."

Justice Quain, concurring in the decision, took occasion to express and emphasize the same point:

"It is clear from *Reade* v. *Conquest* that anybody might have dramatized the novel if Mr. Holingshead had not done so, and I cannot understand that his putting the novel forward into the form of a drama can deprive other persons of the right to dramatize the novel which they enjoyed before he did so."

[NOTE.—The perfect analogy between this proposition as to dramatization and the proposition laid down by Justice Greer in *Stowe* v. *Thomas* with respect to translation will not escape notice. Mrs. Stowe had translated her novel into German, as Mr. Holingshead had adapted his novel into a drama. In each case, a third party independently did in his own way the same thing that the author had done,—translating the novel into German, adapting the novel into drama,—and in both cases and upon similar reasoning, the act of the third party was held to be no infringement.]

Tinsley v. *Lacey* (1863), 1 H. & M., 747, 32 L. J. (Ch.), 535 (537). The court states the facts thus:

"What has been done is this: An attractive and interesting work of fiction has been published and Mr.

Sutter has thought it worth while to extract a large portion of it in the very language in which the events are narrated. . . . He has taken one-fourth, at least, of the matter bodily out of the plaintiff's publication.

"*That, for the purpose of narration, for the purpose of dramatization, or anything else except printing, he was at liberty to do.*

"But he chooses to put into print that one-fourth which he has taken bodily out of some publication which is protected by copyright. He cannot escape from the consequences of so doing.

"He reprints a book which he calls his own. (I have the book alone to deal with; I have nothing to do with the drama.) He reprints that book to the extent of one-fourth of its stirring passages,—what Lord Cottingham calls the 'vital part of the novel,' in the identical language in which the author composed it. No doubt, that is an infringement of the Copyright Act.

"There can be no doubt on comparing these novels with the dramas that the stirring parts have been extracted from the novels and printed, and the defendant is using the property of this lady [the plaintiff] to improve his own property.

"*As long as he does this for the purpose of dramatizing, the law does not interfere.* (Italics ours.)

"The Legislature has not thought it right to prevent any work from being dramatized, and has not yet made any enactment on the subject.

"It has been held that the right to security on the property (the copyrighted book) is only that which is defined by statute, and that, therefore, any person might, if he pleased, read to any audience, however large, the whole of any work if it is thought desirable, and he would not fall within the provisions of the Copyright Act which prohibits the *multiplying of copies.* (Italics ours.)

"In the same way, a work might be dramatized and certain portions of the work might be read and portions might be interwoven into a drama, and again the author could not complain.

"But the moment he puts it into print he brings himself within the law, and the lady (the plaintiff) becomes entitled to protection. I do not proceed at all upon the ground of its being unlawful for the defendant to take the incidents. What I proceed upon is this,—that he has taken bodily the words."

Comment cannot add to the clearness of the above enunciation of the proposition that the copyright confers only a monopoly of multiplying copies, and copies in the ordinary sense of visible, tangible copies—copies printed—the "book" as distinguished from the story or the incidents, and as distinguished from the audible repetition **even of the exact words.**

Warne v. *Seebohn*, 39 Ch. D., 73 (1888). The famous work, "Little Lord Fauntleroy," was dramatized and performed by one not the author of the story. The author owning the copyright made no complaint of this. Four copies were made by typewriting of the dramatization. This was complained of as an infringement. The court said:

"The statute confers upon the author of the book or his assignee the sole and exclusive liberty of printing or otherwise multiplying copies of the book.

"By implication every person, other than the author and his assignees, is prohibited from printing or otherwise multiplying copies of the book. And this is the only restriction imposed on the public, and subject to it every person is free to make such use of the book as he pleases. So long, therefore, as he does not print or otherwise multiply copies of the novel, any person may dramatize it and may cause his drama to be publicly represented.

"But if for the purpose of dramatization he prints or otherwise multiplies copies *of the book*, he violates the right of the author no less than if the copies were made for free distribution."

That the gist of infringement was considered as con-

sisting, not in the dramatization nor in the multiplying of copies of the dramatization, but only in the embodiment in the multiple copies of the drama of the matter taken bodily from the copyrighted book, is evident from the order of the court, which is:

> "I have come to the conclusion that it may not be impossible for the defendant to sever the passages which he has extracted from the novel from the rest of his work, and if he desires it I will give him an opportunity of doing so."

This was in lieu of orders that the four copies complained of be delivered up to the complainant or destroyed.

HISTORY OF UNITED STATES STATUTES INDICATES THE SAME INTERPRETATION.

In the United States the statute took such early notice of the fact that copyright of a book not dramatic *would not without express provision, include the monopoly of dramatizing*, and that copyright of a dramatic work *would not without express provision, include the monopoly of performing or representing it*, that the question seems never to have arisen in the United States courts; and it is in the statutes, therefore, rather than in the decisions of the courts that there is found the complete concurrence with the doctrines laid down by the English courts in the cases above cited.

In the copyright statute of the United States prior to the Act of 1856 no notice is expressly taken of dramatic works or of dramatization or public performance. The Act of 1856, however, expressly provides—

> "that any copyright *hereafter* granted under the laws of the United States to the author or proprietor of any dramatic composition designed or suited for

> public representation shall be deemed and taken to confer upon the said author or proprietor, his heirs and assigns, along with the sole right to print and publish said composition, the sole right also to act, perform or represent the same, or cause it to be performed or represented upon any stage or public place during the whole period for which the copyright is obtained."

This legislation indicates clearly two things:

First. That the Thirty-fourth Congress, which enacted it, was not of the opinion, and did not intend to declare that the prior Copyright Acts gave the author or proprietor of a dramatic composition the exclusive right to make or perform the same. This is indicated clearly by the word "hereafter" before italicized.

Second. That the prior Acts only gave him the right to "print and publish the said composition,"—indicated in the clause of the Act—"*along with* the sole right to print and publish the said composition."

From these two premises it follows that that Congress did not regard the word "publish" in the prior Acts as including public performance or representation on the stage.

The Copyright Act of 1870, passed by the Forty-first Congress, in Sec. 86 consolidated the provision above quoted from the Act of 1856, with the general provision granting copyright, in the following language, defining the scope of copyright:

> " the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same (the copyrighted work), and in the case of a dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others."

This section expressly recognizes, or carries on in the statute the recognition of, the insufficiency of the words

"printing, reprinting, publishing, completing, copying, executing, finishing, vending," to cover or include the public performance of a dramatic composition, and the necessity, therefore, of adding an express provision to include it.

Prior to this Act of 1870 the statute contains no recognition of the literary work of dramatizing a non-dramatic work, but in this Act of 1870 express recognition is given in the following clause, which concludes Sec. 86:

> "and authors may reserve the right to dramatize or translate their own works."

As indicated in considering this clause in connection with translation, the limited character of the privilege granted emphasizes the distinction which Congress thus expressly recognized between the original creative act of the author and the subsequent re-casting process, the author being given, in respect to the original creation, the sole right to print, reprint, publish, etc., but in respect to the re-casting, only the privilege of *reserving* the exclusive right. The author was thus given, so to speak, an option to dramatize, but not the exclusive right, unless he gave expression to his exercise of the option. This sets apart the right of dramatization from the underlying copyright, indicating that in the absence of this express provision it was regarded precisely as the English decisions above cited show it to have been regarded in England.

That this view was adhered to through all subsequent copyright enactments is manifest from the next amendment to the statute, which touches upon dramatization, being the Act of 1891, in which, for the provision authorizing the author to reserve the right of dramatizing or translating, it substitutes the following express grant of the right:

> "and authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall be obtained under the laws of the United States."

This provision still continues the line of distinction sharply between the underlying copyright and the appurtenant right of dramatization, which, as already indicated, the matter of translation is made an especial privilege (assignable), conditioned only upon a copyright having been obtained, but not running with that copyright to the purchaser thereof, but remaining in the *author* by virtue of the existence of the copyright, which he may have sold.

Each of these discriminations in the statute between the underlying copyright and the appurtenant dramatization right, serves to set off the one from the other, and to emphasize the understanding and intention of Congress that in the absence of express enactment, copyright did not cover the right of dramatization of a non-dramatic work.

Monopoly of Abridgement.

This has been uniformly denied in the United States as incident to or flowing from copyright. *Story* v. *Holcomb*, Fed. Cases 13,497, 4 McLean, 306; *Lawrence* v. *Dana*, Fed. Cases 8136, 4 Cliff. 11, 2 Am. Law, T. Rep. (N. S.), 402, and many cases therein cited. Vol. 15, Fed. Cases, p. 559.

TRANSFERENCE FROM ONE FORM OF ART TO ANOTHER.

In as many instances as the question has ever come before the courts of England and the United States it has been held that the reproduction of the substance of a copyrighted work of art in a form or type of art other than

that in which it was copyrighted does not infringe the copyright.

TABLEAUX OR LIVING PICTURES OR WAX WORK DO NOT INFRINGE PAINTING FROM WHICH THEY ARE REPRODUCED.

Hanfstaengl v. *Baines*, 63 L. J. R. Ch., 681, and 64 L. J., 81. In this case the copyright sued on was upon a picture, a painting, and the infringement complained of consisted in rough sketches of certain theatrical presentations in the nature of so-called "living pictures," wherein a rough background is supplied on canvas, and the remainder of the picture is made up by living persons dressed and posed similarly to the painted picture. This was held no infringement, either of the painted picture or of the original design therefor, although the reproduction was as nearly perfect as within the art of the persons attempting it. Lord Justice McNaughton, rendering the decision of the court, says:

> "It appears to me that the sketches in the 'Daily Graphic' which was complained of, are not within the mischief which the Act was designed to repress. They cannot, I think, by any possibility, have any injurious effect on the artist's reputation, nor can they, I think, under any conceivable circumstances, detract in the slightest degree from the commercial value of the artist's work, or come into competition with it or any reproduction of it."

In *Hanfstaengl* v. *Empire Palace*, 70 L. T. R., 459 (1894), 3 Ch., 109, the copyright sued on was of the same picture, and the infringement complained of was the living picture itself; that is, the reproduction with living persons posed and dressed to imitate the picture, against a background painted to simulate the background of the

picture. Justice Sterling held that there was no infringement, saying:

> "It seems that the reproduction must be of a 'painting' character, and that reproduction in marble or by grouping living people is not a reproduction within the Act."

On appeal this view was confirmed, Lord Justice Linley giving his opinion as follows:

> "We are asked to say that the words, 'copying and reproducing by any means,' means reproducing in the sense of imitating or repeating by means not equivalent to drawing or painting or photography, or any such means at all, but by totally different means, viz., by the exhibition of living pictures. Is that what the Act was intended to prevent? It appears to me plainly that it was not."
>
> "It was not intended to give the author the right to restrain Madame Tussaud from exhibiting them in wax works."

In the same case, Lord Justice Kay, concurring, said:

> "Now, is what has been done here a reproduction of the painting? A reproduction of a painting must be, one would think, by another painting or something equivalent to another painting, and I do not think it has been argued upon that ground, that this is a reproduction of the painting.
>
> "It seems to me that in order to reproduce the painting, you must have something it would be proper to describe as the picture itself."

Dicks v. *Brooks*, 43 L. T. R. (N. S.), 71, 15 Ch. D., 22. The significant words of this decision are:

> "It is a work of a different class, intended for a different purpose, no more calculated to injure the reputation of the engraver or the commercial value of the engraving in the hands of the proprietor than if the same group were reproduced from the engraving by wax works at Madame Tussaud's, or in Plaster Paris cast, or in a painting on porcelain."

III.

Musical compositions mentioned as the subject of copyright are tangible and legible embodiments of the intellectual product of the musician, and not the intangible intellectual product itself.

The leading ground upon which the appellants base their contention that perforated sheets or so-called "music rolls" infringe the copyright, is that the musical composition of which copyright is granted is the musical concept when it has once been identified by expression, whether oral or written. This statement of the contention is borrowed from brief of the complainants in the court below (pages 42-3). The same contention is most succinctly expressed in the several assignments of error in the decision of the Circuit Court,—for example—

Third assignment of error:

> "The court erred in holding . . . that the definition . . . does not permit the inclusion in Section 4952 of the Revised Statutes of a musical conception, or the inclusion of collated musical sounds, or the expression of musical composition; and by failing to hold the contrary thereof."

Fifth assignment of error:

> "The court erred in holding that the words of the statute have reference to the tangible object that appeals to the sense of sight, and that which is susceptible of being reproduced by printing, copying, publishing, etc., and by failing to hold the contrary thereof."

Sixth assignment of error:

> "The court erred in failing to hold that Section 4966 of the Revised Statutes . . . makes it necessary to construe all sections of the Revised Stat-

> utes relating to copyrights, as applying, not only to a record or tangible expression of it, but also to the musical composition itself."

The record in this case contains a large amount of testimony adduced with the obvious purpose of forcing this meaning of the intangible, intellectual product upon the statutory term, "musical composition."

It was perhaps waste of effort on the part of the defendant to follow the complainant in this line of testimony, even for the purpose of unraveling some of the intricacies of definition with which the record has become complicated, because it is manifest at once that the phrase has two distinct meanings in common use and that the definition which would naturally be given to it by the professional musician having in mind his own use of the term and not any use in a particular connection as in the statute, would bear no relation to and throw no light upon the meaning of this phrase as employed in the statute.

It need not be controverted that the term "musical composition" can be used, and in musical treatises and discussions among musicians probably would be more frequently than otherwise used, in the sense of the definition given by Prof. Parker (printed Record, page 77):

> "A musical composition is the realization of the musical idea of the composer;"

or by Prof. Gow, Record, page 38:

> "A musical composition is an orderly combination of musical tones renderable by musical instruments or the voice;"

or as involved in the statement of Mr. McWhood in his answer to X-Q. 21, Record, page 53:

> "No, it is not necessary that a record of a musical composition should be legible to the eye;"

and to the same intent are the answers of certain of the defendant's witnesses, for example, Mr. Henderson, who says, Record, page 388, answer to question 3:

> "A musical composition is an arrangement of musical tones in such an order that they create musical sense."

Complainant's theory of its case rests upon this definition of "musical composition" as the intangible, mental product; and to sustain and divert attention from the difficulty of reading the statute throughout in this sense, certain terms foreign to the statute are introduced and extensively defined by the appellant's witnesses, with the obvious intention of having them take the place in the mind of certain other words which the statute uses.

"Record"—"Musical Notation."

The copyrighted sheet is alleged by the complainant to be a "notation" or "record," or "record in musical notation" of the "musical composition;" and the perforated controlling sheet of a playing machine is declared also to be a record or notation in another system of the same musical composition; and then it is assumed that because the copyrighted sheet is a record, and the perforated sheet is also a record, and they both record a certain musical composition, therefore the latter infringes the copyright on the former.

Gow, Q. 8, Record, page 39.

See the following testimony of McWhood, Record, page 53:

> "X-Q. 25. Do you consider the furrow traced on the graphophone roll by the point of the recorder a notation of the musical composition, the perform-

ance of which causes the recorder to trace that particular furrow?

"A. Yes.

"X-Q. 26. Do you regard the cylinders of the so-called music boxes having pins projecting from their surfaces for the purpose of impinging upon the sounding reeds as the musical notations of the particular compositions which are produced by these music boxes?

"A. Yes.

"X-Q. 27. Considering the fact that a different reed plate placed in registration or co-operation with the roll and with its pins would cause the roll to produce a different audible result, would you not have to include the re-plate with the cylinder to make up the complete musical composition?

"A. No; the cylinder of which you speak would be a form of musical notation if it were not in play at all.

"X-Q. 28. You are familiar with the disks that rotate about their center and by means of projections or recesses or irregularities in some form cause sounding devices to operate to produce music audibly; are such disks within your definition of a musical notation?

"A. Yes, so far as I am familiar with them."

Or, as stated in the testimony of Reginald DeKoeven, printed Record, page 59:

> "Whether the composer's thought is recorded on the phonograph, in sheet music or on a self-playing instrument, it seems to me to make no difference as to his rights in receiving compensation for his work, which under one form of record is granted him by the statute."

It is evident that in all this accumulation of testimony around the word "record" the purpose is to cause it unconsciously to take the place in the mind of the statutory word "copy;" and to cause it to be assumed that the copyright is, in fact, a "record-right," and that the essence of

this right, which has been so often and authoritatively declared to be *"monopoly of the multiplication of copies,"* is, in fact, the monopoly of multiplying and vending "records" of his composition.

The fallacy in this implied argument is obvious upon analysis. It is easy to slur over the suppressed premise of the argument, viz., *that a record is a copy in the sense of the copyright statute,* and to omit to question the correctness, in the light of the statute, of this essential but suppressed premise.

It seems pertinent, therefore, to inquire why the complainant is at such elaborate pains by its expert witnesses to put forward as substitutes or equivalents of the statutory term "copy," and to define the non-statutory terms "record" (of musical composition) and "notation" (of musical composition), while conspicuously omitting to define the statutory term. And the importance of the suppressed premise or its pertinence in the line of the complainant's argument must not be overlooked.

This pertinence consists in that the meaning of the term "musical composition"—whether it denotes the intangible mental product or some tangible, visible expression of it —is determinable by the fact that **the term "musical composition" is associated in the statute with the word "copies," and its significance must therefore be one consistent with the association.** This will appear clearly if the complainant's definition of "musical composition" is substituted in the statute for the term itself in connection with the word "copy" and "copies" used in the statute.

The employment in the statute of the word "copy" and "copies" for referring (*a*) to units of the copyrighted thing which are to be filed (for identification of the work

which is to be protected), and (*b*) to the units which are to be severally marked with the year of copyright in order to preserve the rights secured, and (*c*) as embodied in the name "copyright" applied to the right itself, can not be without significance.

If we substitute in connection with these words of the statute the complainant's definition of musical composition for that term itself, we shall find Section 4956 prescribing that in order to be entitled to copyright the author or proprietor claiming the same shall deliver to the Librarian of Congress, or deposit in mail addressed to that officer

two copies of

such thing intangible.

We find the Section of Statute 4962, providing that no person shall maintain an action for infringement of copyright unless the word "copyrighted," with the year and name of registrant *is inscribed upon*—

some visible portion of

such thing intangible,

We shall find the statute providing, in Section 4964 that every person who, after the steps for protecting copyright have been duly taken, shall without consent, etc.,

sell any copy of

such thing intangible,

shall forfeit to the proprietor all the

plates upon which there shall have been printed

such thing intangible,

every sheet copied or printed of

such thing intangible,

and shall forfeit $1.00 for every

sheet found in his possession of

such thing intangible,

In other words, we shall find the statute assuming that the thing called a "musical composition," which the statute protects by copyright, as such a thing, that a copy of it can be—

deposited in mail;
filed with the Librarian;
marked on a visible portion;
printed from a plate;
found in one's possession.

If the statute had intended by the term "musical composition," the intangible thing which it is defined to be by the complainant's witnesses, would the term "copy" have been applied to it?

If the intangible meaning were in mind some other word than "copy" would undoubtedly have been employed. The word "record" is not a new one; the word "notation" is old as applied to musical composition. Both words would have been available at the time the statute was enacted. **If the legislators had in mind the intangible thing which the complainant asserts, would they have passed by these obvious terms to select a word so difficult of interpretation consistently with the intangible sense?**

The word "copy" naturally and in ordinary use, devoid of rhetorical figure, is applied to things tangible or visible. A picture is copied; a writing is copied; a shape may be copied. Things audible may be *imitated, reproduced, repeated,* but *not copied.*

It will be seen, therefore, that the trouble with the definitions which the complainants give to the word "record" and "notation of musical composition" is that

they still leave the statute entirely uninterpreted in respect to the scope and meaning of the word "copy" as applied to musical composition; and the elaborate discussion of "notations," "systems of notation," modes and means of "recording" musical ideas, and all that makes the bulk of the complainant's record, may be dismissed *as utterly beside the question, and as throwing no light at all upon anything material to the issues, except as they show that the complainant realized that the actual terms of the statute would not fit with its theory of the meaning of musical composition as therein used, and that some substitution was necessary in order to sustain the position assumed.*

It would be obviously a far-fetched use of the word "copy" to apply it to things resting in mental conception, and the statute will not be thus violently strained from a more natural significance so long as that more natural significance can be found at all consistent with its obvious general intent.

A "Copy" in the Sense of the Statute Is Simply One of the Multiples, Not Distinguished From "Original."

But there is a further difficulty in the way of adopting the complainant's definition for the statutory term "musical composition," arising out of the clearly and conclusively reasoned interpretation which has already been given by the United States Circuit Court of Appeals to the word "copies" as used in the different sections, particularly Section 4962 relating to marking. In *Pierce* v. *Werckmeister*, 72 Federal, 54, Justices Colt, Nelson and Webb concurring, it was expressly held that the word

"copies" in the statute is not employed by way of distinction from originals. The language of the decision upon this point is as follows:

> "If we confine ourselves to the subject of copyright and eliminate from our mind any distinction between copy and original, the meaning of Section 4962 seems to be clear. It begins by declaring that 'no person shall maintain an action for infringemet of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, etc., etc.' The words 'several copies' are not used in the sense of a copy or reproduction from some original but are used in the sense of each individual copyrighted thing, whether a copy or an original so-called, and the words following,—'of every edition published,'—plainly mean every published production or reproduction of every copyrighted thing. In Webster's International Dictionary we find among the definitions of the word 'copy' —'an individual book, as a copy of the Bible,'—and it is in this sense the word is used in this section. We copyright a book under Sections 4952 and 4956 and Section 4962 then requires that in order to maintain action for infringement notice of copyright shall be inserted in each book (whatever be the form of the book) which is published, and that upon each book of every edition or reproduction which is published. The fact that such book may be a copy from some original manuscript is immaterial and has nothing to do with the notice required by this section. It is the published book, the book which is made public by offering for sale or otherwise, which must contain the notice. A book is published in multiples and no one particular book is any more entitled to be called original than another. We copyright a map and Section 4962 declares that in order to enforce our rights against infringers notice of copyright must be inscribed upon the published map and upon each map of every edition or reproduction which is published. The fact that the map may be an impression from some original drawing or design

is foreign to the question of notice under this section."

It is evident, therefore, that the sense in which the word "copy" or "copies" is used in the copyright statute is one which makes a "copy" of a musical composition merely **one of the multiples of the musical composition** indistinguishable from any other multiple or from any other thing which the statute calls the "musical composition."

If, therefore, this copy is something which can be *delivered* to the Librarian of Congress, can be *marked with a date*, can be forfeited and delivered up for cancellation, **the same is true of the musical composition itself—that is, of the essential thing, which is protected by copyright.**

This definition thus authoritatively given precludes the substitution of the word "record" or "notation"—using those words in any sense in which they have been used in this case—for the purpose of distinguishing from the musical composition itself by distinguishing between the intangible mental product and the tangible commercial product.

All Other Subjects of Copyright Are Tangibles.

The same conclusion—that "musical composition" in the statute denotes something tangible and visible and not the intangible mental product—may be reached along another equally clear line of reasoning.

Section 4952 of the statute enumerates fifteen distinct items of subject-matter of copyright: (1) book; (2) map; (3) chart; (4) dramatic or musical composition; (5) engraving; (6) cut; (7) print; (8) photograph; (9) negative of same; (10) painting; (11) drawing; (12)

chromo; (13) statue; (14) statuary; (15) model or design to be perfected and completed as a work of fine arts.

That the term "book" denotes the tangible printed sheet or collection of sheets and not the intangible mental product is determined in *Stowe* v. *Thomas*, 2 Wall., Jr., 547 (Federal Cases 13,514).

That the term "map" denotes the tangible thing known by that name and not the intangible mental picture in the memory of the surveyor; that a "chart" is not a mental diagram but a physical, tangible one, is clear beyond argument.

A "painting" or "drawing" which the statute protects is not the artist's dream or mental conception, but the visible product of his genius and skill on canvas, paper or wall. A painting made without paint, a drawing made without marks, would be a contradiction of terms.

A "statue" or "statuary" is not the vision that the sculptor sees in the uncut marble block, but the *thing of determined form which he actually cuts out of it.*

The words "engraving," "cut," "print," "chromo," "photograph," "negative," cannot be tortured into denoting anything else than the tangible visible things for which they stand in common speech.

The "model or design to be perfected and *completed* as a work of fine arts" is clearly something of which the physical execution has been *commenced* and carried far enough to indicate what it is to be when completed. If it had been intended to denote the mere conception the language would naturally have been "model or design *'to be made'* as a work of the fine arts." Moreover, the word "model" has only a physical meaning and cannot denote the invisible or intangible, and the word "design" is clearly a mere *alias* used to qualify the word "model"

by indicating the character of the model as incomplete but indicative of the completed thing designed.

Beyond question, **thirteen**—and with very little room for question, the fourteenth—**out of the fifteen** items named in the statute **are unmistakably physical, tangible, visible products,** and not mere intangible mental products.

Is it reasonable to assume that the fifteenth is the exception and that it alone out of the entire list denotes the intangible mental product?

Is it probable that the Legislature intended to give to the author of a book protection only with respect to the composition in *written or printed* words and sentences allowing him no monopoly of the same words and sentences *vocalized*, and —except by subsequent express statute—no monopoly even of the written or printed expression of the same ideas in a different language requiring translation, but that to the music composer it intended to give the monopoly of the intangible mental product—of the "music," however produced and by whatever method recorded for communication to others?

The improbability of such remarkable expansion of the right in respect to one of the long list of subjects in comparison with the others should alone prevent the adoption of that interpretation.

Some Results From Complainant's Theory.

APPELLANT'S VIEW MAKES ALL IMPARTATION INFRINGEMENT.

The statute prohibits or secures to the copyright owner the monopoly of *"vending"* the copyrighted musical composition. It also prohibits the *"copying"* of the same. The term "copying," it will not be questioned, at least in-

cludes, and primarily indicates, the multiplication of copies. According to the appellant's view,—that the "musical composition" copyrighted is the intangible music, and not merely the tangible notation,—it follows that the copyright owner is by the copyright secured the monopoly of *vending* the *"music,"* as well as of making copies of the notation in any form; and under these two monopolies he is secured *all the pecuniary profit which may be derived from the intellectual product itself;* because profit can be derived only by *pay for impartation* in some manner; and impartation in any manner *for pay*, is "vending," whether it is accompanied with or effected by a delivery of copies, which would be an indirect mode of impartation, or by the *direct communication* of the music, *without intermediate delivery of copies.* To state the matter in a little different manner: The statute secures not merely the monopoly of *vending copies,* but the monopoly of *vending* the *"musical composition";* and if the "musical composition," in the sense in which that term is used in the statute, is the intangible music, and not merely the notation, the conclusions above stated follow.

In this view the statute makes unlawful without the composer's consent each of the following:

1. Singing a copyrighted song for pay;

2. Playing a piece of copyrighted music on an instrument for pay;

3. Teaching a piece of copyrighted music, vocal or instrumental, to another for pay;

for each of these acts would constitute "vending" the "musical composition," if that term denotes the intangible intellectual product.

And since it would be infringement to print a copyrighted book or picture and *give it away*, just as really

as it would be infringement to sell it, and since the infringement in this case would consist not in printing the book or picture,—making copies,—but in circulating or distributing it, which is "vending" within the meaning of the statute, so it would be infringement of a musical copyright to do either of the following things:

4. To sing a copyrighted song within the hearing of another *without pay;*

5. To play a copyrighted piece of music upon an instrument within the hearing of another *without pay;*

6. To teach a copyrighted piece of music, vocal or instrumental, to another *without pay.*

These conclusions flow conclusively from the interpretation which appellant seeks to put upon the statute, for, beyond controversy, each of these supposed acts,—singing the song, playing the music, teaching the music,—if done within the hearing of another and for imparting the music to another, appropriates unlawfully, and imparts unlawfully, the intellectual product of the musician without his consent, and *without revenue flowing to him therefrom.*

Implied License.

The performer of either of these acts can avoid being an infringer in the performance of them only by virtue of some express or implied license or permission from the copyright owner. Such implied license or permission probably is involved in the sale of a copy of the copyrighted music; but the utmost stretch of such implied license will not make it involve permission to the purchaser of a *single copy* of the copyrighted music, to impart the music,—the intellectual product copyrighted,—*to an unlimited number of persons*, or to teach it to a pupil.

The premise involves logically that that for which the composer might have exacted compensation may not be done or taken without compensation rendered to him *for and on account of the very doing or taking*. If his right is that of monopoly over the entire pecuniary profit to be gained from his intellectual product, how illogical it would be to permit to leak out through a single 25c copy sold to one person, the full value of the intellectual product to a thousand persons, who, to satisfy the monopoly, ought to have paid the same price as the one who got no more of the music by buying the copy than each of them by hearing it played or sung.

But furthermore, how about the one who *bought* no copy, *borrowed* no copy, had no copy *read* to him, but having a quick ear overhead the music played by one who legitimately owned the copy and was entitled to enjoy it? This person is by accident, and without his fault, in possession of the intellectual product of the composer; but *it will not be without his fault* if he *sings* it to another; if, being a skillful player upon a musical instrument he *plays* it to the delight of a multitude. What if, through one such accidental eavesdropper the whole town acquires full knowledge of the composer's music, and without contributing a penny to his revenue, derives as full knowledge of it as if every one of them had bought a copy, and hired a teacher to teach it, or a musician to play it. Shall not the composer have the right to sue the singer or the player to recover the amount which the composer might have charged for imparting the musical composition to the entire number who have thus derived it?

Let no confusion arise at this point. The question is not whether the musician is or is not reasonably entitled

to have some compensation for his intellectual product beyond what he may be able to exact by the sale of copies. If he is entitled to more, it is perhaps open to Congress to give him more. The question is simply whether *he is given more by the present statute,* and by Section 4952 of that statute.

There is an attempt to give him somewhat more by Section 4966, and that Section fixes proper limitations putting him in the category of the dramatic writer whose writings are valuable to be performed and not to be read; so the composer *whose music is to be performed* may exact compensation for the public performance. (But the composer whose music is not to be performed is probably in no different category from the writer of a story, whose story is to be read and not to be performed.)

The defendant's view, on the contrary, is—and this is the point for comparison—that the statute authorizing copyright of "musical compositions" authorizes copyright **as of a tangible thing**—of which copies shall be printed, and may be sold and marked with a date, and found in the possession of an infringer; and that the revenue or compensation secured to the composer by this section of the statute is identical with that which is secured to the author of a book or the painter of a picture—namely, **that which may be derived from the monopoly of multiplication of copies,** and not all that may be derived from any and every mode of impartation to others of the intellectual product.

Nor is it possible to escape from the obviously untenable position to which appellant's premise leads, by pointing out, as the appellants have done, that the sale of a perforated roll is strictly analogous to the sale of a sheet of music in staff notation, in that as the possession of the

latter acquired by such sale enables the purchaser, if sufficiently trained in music, to derive through the sense of sight the full knowledge and possession of the music, so the possession of the former acquired by the sale enables the purchaser to derive through the ear, when the perforated roll is used in conjunction with the proper instrument, the full knowledge and possession of the music.

The fallacy hidden under this comparison lies in that the sale of the copyrighted sheet in staff notation is not an infringement by virtue of the fact that thereby the purchaser *may* become possessed of the *intangible* musical composition—the musical idea of the composer—but by virtue of the fact that he *does* become possessed of the *tangible* musical composition—the printed sheet.

That he does or may, through the copyrighted sheet, become the possessor of the intangible mental product—the composer's musical idea—is a fact analogous to the fact that the buyer of a book may thereby become possessed of the ideas of the author (if he will read the book and has capacity to assimilate the ideas), but the seller of the book infringes the copyright equally when he sells to a man who cannot read or who cannot understand what he reads, as when he sells to one whose capacity for reading and understanding is equal to that of the author. In each case the seller causes the purchaser to become possessed of **the copyrighted thing, which is the book and not the ideas.**

So, in the case of music, the purchaser of an unauthorized copy of a copyrighted musical composition may or may not thereby become possessor, by the purchase, of the intangible mental product,—the musical idea of the composer; **but he does become possessed of the tangible, visible thing**; and the seller thereby infringes.

Usage of Musical Experts Sustains the Tangible Sense.

Even if the questions involved in this case had to be determined without the assistance of the light afforded by prior decisions and solely in the light of the definitions which might be given of the terms "musical composition" and "copy of musical composition," the usage of musicians, as shown by abundant testimony in the record, would fully warrant the adoption, for the purpose of construing the statute, of the definition making these terms relate to the tangible and not to the intangible.

Mr. Gerrit Smith, than whom no man in the country stands higher in respect to expert and technical knowledge of musical topics, terms and usages, defines "musical composition" and "copy of musical composition" thus (Smith, Qs. 7 to 9, Record, pages 536-7):

> "Q. 7. In defining musical composition as an art, you distinguish, I understand, the process from the product. Will you now give us a definition of *a* musical composition, meaning a product of the art of music composition?
>
> "A. A musical composition consists of a series of musical ideas expressed in terms of pitch duration and notation, as I have before stated. *and so arranged as to be capable of interpretation by musicians.*
>
> "Q. 8. What would you understand by the term 'A copy of a musical composition,' interpreting that phrase in accordance with the usage of the art, or as it would be understood by musicians?
>
> "A. A representation or reproduction of the original in such manner as could be readily or reasonably interpreted by musicians. Instead of 'interpreted' I should say 'read.'
>
> "Q. 9. Will you explain why you prefer to change the word 'interpreted' to the word 'read'?

Is there any ambiguity or double use of the word 'interpret' among musicians, which makes you prefer the use of the other word?

"A. I use the word 'read' instead of 'interpreted' because it applies to the actual fact of recognizing the piece, in contradistinction to the performance of the same."

Smith, X-Q. 8, Record, page 542:

"X-Q. 8. Why, then, do you define a musical composition to consist in a series of musical ideas so arranged as to be capable of interpretation by musicians, when neither a visible manifestation is a necessary element of a musical composition and a musical composition is not exclusively intended for musicians?

"A. Because a musical composition, in my sense of the term, cannot be either read nor properly interpreted by one without knowledge of music. If a composition is *not in print it is not,* to my mind, within the meaning of the term 'a musical composition.'"

And Mr. Henderson, who primarily applies to "musical composition" the definition hereinbefore quoted—"An arrangement of musical tones in such order that they create musical sense"—interprets the term "copy of musical composition" in the sense in which that term is commonly used. Henderson, Qs. and As. 5 to 7 and 9 and 10, Record, pages 588-590:

"Q. 5. When to this musical composition fully and completely existent in the composer's mind, there is given by the voice or suitable instrument audible expression, is such audible expression of the musical composition a copy of it?

"A. No, sir. That is not a copy. When a person performs or sings a piece of music he doesn't sing or perform a copy of it; he sings or performs the piece itself.

"Q. 6. When by such audible performance, vo-

cally or instrumentally, the composer's musical ideas as embodied in such composition are conveyed to the mind of another person capable of receiving them fully, is the conception which such other person thus derives (assuming it to be perfect or as nearly so as possible) a copy of the musical composition which was first existent only in the mind of the composer?

"A. No, sir. That is not a copy, because what that second person performs or sings is unquestionably the composition itself, no matter how he has acquired it; if he has it in his mind and can play it or sing it he has the composition.

"Q. 7. If neither the audible reproduction, that is, the tones themselves in their proper succession and relation, or the complete reproduction of it as a conception in the mind of another person, constitutes a copy of the composition, what is a copy of a musical composition?

"A. Copy of a musical composition is a written or printed record of it, in intelligible notation.

. . . . . .

"Q. 9. . . . Since the musical composition itself is directed to the hearing, or the mental sense corresponding thereto, and is apprehended or interpreted directly, to what sense must the symbols which make up musical notation be addressed?

"A. I think I have already covered that point in a previous answer, when I used the word 'visible.' It must be addressed to the sense of sight.

"Q. 10. Then would you consider the impression made on the roll of the graphophone by the stylus attached to the diaphragm, which is vibrated by the sounds produced in the presence of it, as constituting a copy of the musical composition, if it were such, the performance of which produced those vibrations and the impression in the wax, by virtue of the fact that by proper adjustment and manipulation it will give back to the ear an impression of those sounds?

"A. No, sir, I don't consider that a copy of the composition, but simply a part of a mechanical method of performing it."

Upon whatever line of reasoning the question be pur-

sued the conclusion must still be the same—that a musical composition, which is one of the subjects of copyright, is the tangible, visible something which can be counted, marked, handled, sold and delivered, and not the intangible something which rests merely in the mental conception or mental possession of composer, seller or buyer.

The question to be answered in this case must therefore be answered without regard to refinements of scholastic definition, but upon the application of sound judgment and common sense, namely, the question broadly whether the perforated rolls in question fall within the proper sense of the term "copy," as employed in the statute to signify that of which the owner of the musical copyright has the monopoly.

IV.

"Copies" which infringe a musical copy right must be tangible embodiments of the intellectual product of the composer in the same sense and for the same purpose as tangible embodiment which constitutes the copyrighted "musical composition."

Somewhat more broadly stated,—that is, without reference to music,—the proposition is that infringement of copyright occurs when the tangible thing made or sold is substantially as to character and function the same as the tangible thing copyrighted.

Ideas are not proprietary. It is the embodiment of an idea that may be proprietary, and there must be the appropriation of the *embodiment in substance, purpose and function* in order to constitute infringement.

This is manifestly the doctrine upon which the above

cited decision of *Stowe* v. *Thomas* (respecting translation) is based. We quote again in part the language quoted above bearing upon this point:

> "As the author's exclusive property in a literary composition or his *'copyr'ght'* consists only in a right to multiply copies of his book and enjoy the products thereof, and not in an exclusive right to his conceptions and inventions, which may be termed the essence of his composition, the argument from the supposed analogy (that of inventions) is fatal. . . . A translation may in loose paraphrase be called a 'transcript' or 'copy' of her (the author's) thoughts or conceptions, but in no correct sense can it be called a 'copy' of her book."

The proposition stated at the head of this section takes the following distinct forms in the various decisions from which the general proposition may be deduced:

The primary use and adaptation of the thing determines its copyrightability or infringement of copyright.

Intention as to use is material and may be controlling.

Things intended for mechanical function—for use in themselves—will not infringe copyright, and are not copyrightable merely because of incidentally being capable of performing some part of the function of things copyrightable.

In *Baker* v. *Selden*, 101 U. S., 99, the Supreme Court held that a book of the character which was designed for use, and not, apart from such use, for conveying information, was not proper subject of copyright; and comparing such book with that which is properly the subject for copyright, the court said:

> "The object of the one is explanation; the object of the other is use."

In this decision the court goes farther than merely to determine that that which has the function of use without the function of conveying information, is not subject to copyright; for it is held that that whose principal function is certain use, even though in such use it performs incidentally another function of conveying information, is prevented from being proper subject for copyright by the *character of its principal use*. Referring to the case of *Corbett* v. *Woodward*, L. R., 14 Equity, 407, in which there was in question the validity of copyright on an illustrated catalogue, Justice Bradley (in *Baker* v. *Selden*) amplifies his view upon the point in question as follows:

> "If a man not being a vendor of any of the articles in question, were to publish a work for the purpose of informing the public what was the most convenient species of articles for household furniture, or the most graceful species of decorations for articles of home furniture, what they would cost, where they might be bought, and were to illustrate his work with designs of such articles described, such a work as this could not be pirated with impunity, and the attempt to do so would be stopped by the court of chancery.
>
> "*Yet if it were done with no such object, and solely for the purpose of advertising particular articles for sale and permitting the display of articles for sale which any person might sell as well as the first dealer, and if, in fact, it contained no more than an inventory of the contents of the advertisement, I know of no law, which, while it might not prevent the same advertiser from selling the same articles, would prevent him from using the same advertisement.*"

It would be difficult, more clearly than in the above paragraphs, to present the proposition that the leading purpose and adaptation of the thing determines its char-

acter as copyrightable or not copyrightable, and that the incidental or ancillary or merely possible additional function of conveying information does not give copyrightable quality.

The opinion and the ground of it in this case (*Baker* v. *Selden*) is still more clearly defined in the following paragraph of Justice Bradley's opinion:

> "The case of *Drury* v. *Ewing*, before Judge Leavitt in the Ohio Circuit, reported in 1 Bond, 540, which is much relied on by the complainant, was one where a copyright was claimed in a chart of patterns for cutting dresses and basques for ladies, and coats, jackets, etc., for boys. *It is obvious that such designs can only be printed and published for information and not for use in themselves.* That practical use can only be exemplified in cloth on the tailor's board and under his shears, in other words, by the application of mechanical operation to the cutting of the cloth in certain patterns and forms. Surely the exclusive right to this practical use was not reserved to the publisher by his copyright of the chart. Without undertaking to say whether we should or should not concur in the decision in that case, we think it cannot control the present." (Italics ours.)

The doctrine in this case is followed in *Amberg File Co.* v. *Shea & Smith*, 53 U. S., p. 449, 82 Fed., 314, affirming the Circuit Court decision in 78 Fed., 429. And the Court of Appeals well sums up the doctrine in the following language of Judge Jenkins:

> "The copyright law embraces those things which are printed and published for information, and not for use in themselves."

In this case the validity of the copyright was contended for on the ground that in connection with the use, the printed matter or arrangement of lettering upon the file

did convey information. But the court points out that they convey information only when subjected to use, and that the use is the primary and controlling function.

In *Rosenbach* v. *Dreyfuss*, 2 Fed., 217, in the 2d circuit, wherein copyright was claimed as for print of printed designs for balloons, hanging baskets, etc., the print consisting in substantial delineation of the form, but (as the court assumed), by means of lines along which the material was to be cut in order to be constructed into the balloon or basket. The court held that such prints as these, in which the imprinting had the function of guiding the manufacturer in cutting, and not the function of presenting a picture as a work of art, were not within the meaning of the word "prints," as used in the statute; and this conclusion was reached without regarding the question of the actual artistic character of the prints, but solely upon regarding the primary function of the printed lines.

Bearing upon the same proposition and throwing additional light upon the question of the present case, are decisions holding that—

Intention as to Use Is Material.

That the intention as to use is material has been repeatedly held.

Perhaps no more distinct statement of this doctrine has been made by the Supreme Court than that above quoted from Justice Bradley in *Baker* v. *Selden*. His announcement of the doctrine in that instance is made by means of a supposed case, but the announcement is none the less distinct and only nominally less authoritative for this reason. The point, however, is directly decided, being

held where it is material to the decision reached in *Higgins* v. *Keuffel*, 140 U. S., 428. The subject-matter involved in this case was a label, which, though it contained information, the court held was not subject-matter of copyright, basing that decision upon the ground that

> " Like other labels it was intended for no other use than to be pasted upon the vials or bottles which contained the medicine. . . . In no respect does this label differ from the almost numberless labels attached to bottles and vials containing medicines and directions how they should be taken. Now these are only valuable when connected with medicine. As labels, they are useful, but as mere compositions, distinct from the medicine, *they are not used or designed to be used*. . . ." (Quoting and approving *Scoville* v. *Toland*, Fed. Cases, 12535.)

[The decision of the Supreme Court in *Bleistein* v. *Donaldson*, 188 U. S., 239 (1903), is not to the contrary of the doctrine expressed by Justice Bradley in the above case. In *Higgins* v. *Keuffel* Justice Bradley assumed, for the purpose of illustrating his point that an advertisement, pure and simple, was not copyrightable, and then proceeded to advance the doctrine that the intention to use certain matter as an advertisement solely (probably meaning in the intention manifest on the face of the thing itself) was determinative against its copyrightability. The case in hand was not that of an advertisement, and the assumption that an advertisement is *per se* uncopyrightable is to be considered merely as a hypothesis assumed for illustration. What the court did actually decide was that, given a certain class of subject-matter outside the range of copyright protection, the question whether a specific thing is or is not in that class, and so is or is not copyrightable, *is to be determined by the intention as to its principal use, and not by the mere possibility of its having other use which would bring it into (or take it out of) copyrightable class.* Whether or not advertisements *per se* are within or outside of copyrightable class is

immaterial to the main trend of the doctrine of Justice Bradley in *Higgins* v. *Keuffel.*]

In *Werckmeister* v. *Springer,* 63 Federal, 808, prints of a copyrighted painting, printed in a catalogue of the collection of paintings in which that copyrighted was exhibited, were alleged to be within the scope of the copyright and to require the statutory copyright mark in order to prevent them from defeating the copyright. The court held to the contrary, saying with reference to the print:

> " It was *not intended* to be a copy of the painting. The *purpose* of the catalogue was to furnish the holder of the catalogue information regarding the paintings or to enable him to find the painting desired and perhaps to recall the paintings to memory afterward. *It was not intended to serve in any way as a copy of the painting.*"

To the same intent is the decision of Judge Shipman, of this circuit, in *Falk* v. *Engraving Co.,* 54 Fed., 890 In this case, a publisher sent to retail dealers exhibition cards containing copies in very reduced sizes of photographs from which the dealers were requested to make their orders. The photographs were copyrighted. The cards did not contain the copyright notice in the language required by the statute. Judge Shipman said:

> " This card or sheet of miniature copies of photographs for the inspection of dealers is not one of the published editions of the photographs which is contained, within the meaning of this section. The statute refers to the published edition, which is an edition offered to the public for sale or circulation."

Here clearly the distinction between *actual* circulation and the *intention* of circulation is made. The edition was not *intended* for public circulation and this *intention* was held to be controlling.

In *Schumacher* v. *Wogram*, 35 Fed., 210: Here the question of whether a pictorial label was properly protected by copyright by filing in the office of the Librarian of Congress as a work of art. Justice Wallace, of this circuit, citing *Schumacher* v. *Schwencke*, 25 Fed., 466, and distinguishing from that case, held that the *intention to use the picture* in one case for a *label* and the *absence of such intention* in the other case—both being artistic, and as to quality equally entitled to protection of copyright—was determinative of the validity of copyright, and that it appearing that in the case then under consideration the *intention* was to use the picture for a label the copyright was *void;* while in the case of *Schumacher* v. *Schwencke*, though the picture was *in fact* used for a label, such *not* being the *intention* when copyrighting the *copyright was valid.*

It needs no argument, it seems, to establish that if the validity of an issued copyright depends upon the intention as to the use of the thing, when it is capable equally of two uses, the intention manifested in the thorough adaptation of the perforated roll to the mechanical use, *over against the mere remote possibility* of its being applied to the use which might bring it under copyright, is determinative in the present case; and if it could not be copyrighted because of the intention unmistakably manifest to devote it to mechanical use and not to the use of copyrightable printed music, *a fortiori,* it will not infringe copyright on the printed music, which is not only intended but solely adapted for the purpose of conveying information and has no other adaptation whatever.

The doctrine is clearly that the primary quality, *the essential quality, the quality determinative of the use,* must be one in which copyrightability inheres; and if the

thing is essentially uncopyrightable, as, for example, a thing having an immoral use, literary or artistic character entering incidentally cannot impair copyrightability. Equally, a thing having essentially a *mechanical use*, and being, by virtue of such essential character, *uncopyrightable*, will not derive copyrightability by incidental possibility of use for other purposes within the copyrightable field. The mechanical use is as certainly *outside* as the immoral use is *contrary* to the scope of the statute. Both are *foreign* to the statute.

In all cases in which the intention as to the use is made material to the conclusion reached for or against copyrightability or infringement of the copyright, it may be clearly discerned that it is not the occult or mental intention of the user, but the intention entering into and constituting the character of the thing itself. The mere recording of the music automatically would be done by recording machines, which *mark* the paper; *but the cutting of the paper distinguishes it and its purpose from any mere record, and thus determines the classification of a thing as subject or not subject to the copyright;* and into this conclusion the latent thought or the expressed thought of the composer to use the sheet thus marked for a record and not as an adjunct of a machine cannot enter. The intention is cut into the paper and becomes permanently a part of its character.

SELLING PLATES WITHOUT KNOWLEDGE OF INTENDED USE NOT INFRINGEMENT.

In *Harper* v. *Shopeli*, 26 Fed., 519, substantially affirmed as to this point by the Court of Appeals, in 28 Fed., 613, it was held that making and selling plates from which a copyrighted book can be printed, is not in itself infringement on the copyright of the book.

In the last mentioned case it is held that making and selling a plate from which a copyrighted picture can be reproduced, without the knowledge that the purchaser intends to use such plate in competition with the original copyrighted work, is not infringement; which involves holding directly such plate is not *per se an* infringement.

> [NOTE: On appeal, it being stipulated that the maker and seller of such plate had knowledge of the intended use, it was held that such making and selling with such knowledge, when followed by the actual use, the intention of which was thus known to the seller, constituted contributory infringement. This substantially affirms the proposition laid down in the Circuit Court decision,—that the making and selling of the plate was not *per se* infringement.]

If making and selling plates from which a copyrighted book can be printed is not infringement of the copyright of the book *in the absence of knowledge that the purchaser intends to use such plate for producing such copies in competition with the original copyrighted book*, notwithstanding the plates have no other use and could not be presumed to have been bought for any other purpose, how shall the sale of the perforated sheet *without* the knowledge on the part of the seller that the buyer intended to use it *for reading therefrom the music as from the copyrighted sheet*, be held to be infringement, when in fact the perforated sheet not only is not designed for such use, but is not even adapted to it, and is expressly designed for a different use, which accounts for its purchase, without room for inference, and there is *not shown to be in existence a single person who can practically use it for the purpose of the copyrighted sheet?*

The conclusion enforced by the above cited cases may be generalized thus:

The accidental or incidental possibility of deriving

from a device whose primary and principal function is one having no relation to copyright, information of or complete possession of an intellectual product susceptible of copyright protection, does not render such device infringement of copyright.

Rosenbach v. *Dreyfuss,* of the foregoing cases, is perhaps most pertinent. It is obvious that to the manufacturer of the articles of the class to which the device of which copyright was claimed in that case belong, the copyrighted diagram would fully disclose the character of the article to be produced. Such an expert in that art would, upon glancing at the device, observe the matter which was to be cut out, would understand how the several parts would come together to make proper joints for the balloon or basket or whatever there might be, and how there would remain the proper drapery or fringe hanging at the sides, and such person, familiar with the art, seeing the copyrighted chart, would immediately form in his own mind a picture of that balloon or basket. He would not have to look twice at the chart in order to see the completed device; he would get from the inspection of it the full conception which he could derive from seeing the article; he would read in the chart the full conception that the designer had in mind as completely as the most highly trained musician reads the note sheet.

But the chart was not made to constitute a work of art; its lines were drawn to cut by. It was intended that it should be printed on paper; that a child should lay that paper on a board and cut the lines marked, lapping the lines where indicated, and thereby making with that paper, not a picture, but a basket or a balloon. To a mind properly trained, the chart conveys all that a complete picture of the constructed article or the article itself

would convey. Even a child would look upon a collection of charts and say,—"I will take this one or that one,"—choosing it for the beauty which he conceives will be in the completed article of which it is the pattern. But this decision denies that this renders the article, which is in fact a blank or flat paper for making a balloon or a basket, and which is marked so as to make the article to be used, and not as a picture, or a work of art,—proper subject-matter of copyright.

This paper thing was made for use. It was not made to convey an intellectual product to the mind. It was intended that one who could not form from it any idea of the article which would result from using it should take it and cut on the lines indicated and put its edges together at those lines, and then and only then should see the completed work of art,—should obtain the intellectual conception.

That is precisely what happens in the use of the perforated sheet. It conveys no information to the eye. It is not intended to convey such information. If by reason of extraordinary expertness of a person having great familiarity with this class of devices such person may derive from the mere inspection of a sheet some suggestion of the music, this is an accident or incident not material to the real function of the perforated sheet, not the occasion of its manufacture, or of its sale, or of its purchase. It is intended that this perforated sheet shall be put into use in accordance with the mechanical functions which controlled its production and determined its form, and that it shall be put into such use in connection with the remaining part of a mechanism of which it is one part, and that then, and only then, the user in this manner shall derive by the mechanism and through the sense of hearing, the intellectual product,—the music.

Precisely, therefore, on the same ground on which the chart or pattern for making the balloon or hanging basket is denied copyrightability, and on the same ground on which, if the balloon or basket were copyrighted as a work, the chart would be held no infringement of it, it must be held that this perforated roll is not copyrightable as a piece of music and does not infringe a copyright on such music.

To the same intent, see the following English case:

Hollinrake v. *Truswell*, 71 L. T. R., 419.

The validity was in question of a copyright upon a chart for making sleeve patterns, the chart being cut from cardboard and having lines and figures of instructions and indications of mode of use thereon. The decision found the copyright invalid. Lord Herschel rendered the opinion, saying as follows:

> "The object of the Copyright Act was to prevent any one publishing a copy of the particular form of expression in which an author conveyed ideas or information to the world. These may be retained by anyone, though the book, map or chart which has embodied them, has passed out of his possession. If he were to commit to memory the contents of the book or information disclosed by the map or chart, he would be as much in possession of the author's ideas or information as if the book, map or chart were physically in his hands. But this is not the case with the words or figures upon the sleeve chart. They are intended to be used, and can only be used in connection with that upon which they are inscribed. They are not merely directions for the use of the cardboard, which is, in truth, a measuring apparatus, but they are a part of that very apparatus itself, without which it cannot be used, and except in connection with which they are absolutely worthless. I think it is clear, therefore, that what the plaintiff has sought to protect under this act for the protection of literary productions, is not a literary produc-

> tion, but an apparatus for the use of which certain words and figures must be inscribed upon it."

Lord Justice Davy added, concurring in the above:

> "It is intended, not for the purpose of giving information or pleasure, but for the practical use in the art of dressmaking. It is, in fact, a mechanical contrivance, compliannce or tool for better enabling a dressmaker to make her measurements for the purpose of cutting out the sleeve of a ladies' dress, and is intended for that purpose."

A familiar illustration of a similar point is found in the perforated card which controls the pattern of a Jacquard loom. It is substantially similar in principle of operation to the perforated roll which controls an automatic musical instrument. Such card sustains precisely the same relation to the pattern which the loom, under the control of that card, weaves, as the perforated roll of an automatic musical instrument sustains to the tune which the instrument, under the control of that perforated roll, plays.

The perforated card on the loom, co-operating with the loom and with the threads which the loom handles, makes the pattern visible.

The perforated roll on the automatic instrument, co-operating with the instrument and with the air currents which the instrument uses, makes the music audible. But the perforated card is not a copy of the pattern woven; no more is the perforated roll a copy of the music played.

The molding bits distributed about the cutter-head of a molding machine, so that when rotated the various elements of form which their edges present combine and blend in the design of the molding, will convey to the mechanic familiar with the machine a clear conception of the molding; but the bits are not a copy of the molding nor of the molding design.

Some corollaries which follow from the propositions above considered may be stated for the purpose of presenting substantially the same conclusions from a slightly different angle of view.

The monopoly conferred by copyright is not a monopoly of making the music heard.

The concrete tangible presentation copyrighted does not include physical means of making the music heard.

"Copies," of the making of which the monopoly is given by copyright, do not include things which are merely means of making the music heard.

That which imparts knowledge or perception of the music only by audibly producing it is a musical instrument and not a copy of the music.

The statute does not intend to give to the composer a monopoly of making instruments to produce his music, even though each such instrument, being adapted to produce only one piece of music, might in some sense constitute a record of that which it produces.

V.

The protection designed to be afforded to the composer by copyright of a musical composition is only the monopoly of the multiplication and selling of copies.

No satisfactory reason can be advanced why this definition of the monopoly conferred by copyright which is repeatedly applied to every other subject of copyright should not be held as applying to musical compositions.

This definition of the monopoly was early laid down by the Supreme Court in *Stevens* v. *Cady*, 55 U. S., 529

(1852). It is followed in *Stowe* v. *Thomas,* Fed. Cases 13,514 (1853), and elaborated in *Lawrence* v. *Dana,* Fed. Cases 8136 (1869), which, though not a Supreme Court decision, is constantly and repeatedly quoted as sound authority. It is still further explicitly announced in *Perris* v. *Hexameter,* 99 U. S., 674 (1878).

VI.

That perforated sheets and other mechanical means of automatically producing music audibly are not infringements of copyrights upon the musical compositions which are thus audibly reproduced, has been the conclusion of every court of England and America before which this question has ever come for decision.

In view of the decisions above cited, all converging to one conclusion, along such various lines of reasoning and from such different points of view, it will be no surprise that upon the precise point involved in this case courts of this country and of Great Britain have reached but one conclusion.

It is obvious, and openly declared in the testimony introduced on behalf of the complainant, that the ground upon which the perforated roll of the mechanical player is considered to be an infringement of the copyrighted music, the so-called "record roll" of the graphophone, the pin cylinder of the music box and the barrel or cylinder of the barrel organ, are also infringements of any copyrighted music which they are made to produce in the machines of which they are respectively parts. With respect

to the graphophone the United States Circuit Court of Appeals has considered the question.

Stern v. *Rosey*, 17 App. D. C., 562.

Justice Shepard, after reciting the facts and the nature of the alleged infringement as consisting in the waxed phonograph cylinders, says:

> "Whatever rights the appellants may have as authors and composers of the subject-matter, their claims must depend wholly for recognition and remedy upon the provisions of the Copyright Act. . . . It seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the Copyright Act. In other words, that while a right did exist by common law, it has been superseded by statute.
>
> "We cannot regard the reproduction, through the agency of a phonograph, of the sounds of musical instruments playing the music composed and published by the complainants, as the copy or publication of the same within the meaning of the Act. The ordinary signification of the words, 'copying,' 'publishing,' etc., cannot be stretched to include it.
>
> "It is not pretended that the marking upon waxed cylinders can be made out by the eye or that they can be utilized in any other way than as parts of the mechanism of the phonograph.
>
> "Conveying no meaning, then, to the eye of even an expert musician and wholly incapable of use save in and as a part of a machine specially adapted to make them give up the records which they contain, these prepared waxed cylinders can neither substitute the copyrighted sheets of music nor serve any purpose which is within their scope. In these respects there would seem to be no substantial difference between them and the metal cylinder of the old and familiar music box, and this, though in use at and before the passage of the Copyright Act, has not been regarded as infringing upon the copyrights of authors and publishers.

"This peculiar use, in either music box or phonograph, instead of coyping the music in the sense of the Copyright Act, to the injury of the publisher, would rather seem analogous to that of one who having purchased the sheet music of the publisher proceeds to perform it continually in public for his own profit."

In *Kennedy* v. *McTammany*, 33 Fed. Rep., p. 584, the precise question came before Judge Colt in the First Circuit. Judge Colt's opinion in that case is in part as follows:

"The sole question in issue is whether these perforated sheets of paper are an infringement of copyrighted sheet music. To the ordinary mind, it is certainly a difficult thing to consider these strips of paper as sheet music. There is no clef, bars, lines or spaces, or other marks which are found in any printed music, but only plain strips of paper with rows of holes or perforations.

". . . I cannot convince myself that these perforated sheets of paper are copies of sheet music within the meaning of the copyright law. They are not made to be addressed to the eye as sheet music, but they form a part of a machine. They are not designed to be used for such purposes as sheet music, nor do they in any sense occupy the same field as sheet music. They are a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument. The bill itself states that they are adapted and intended for a use wholly different from any use possible to be made of ordinary sheet music. Their use resembles more nearly the barrel of a hand-organ or music-box.

". . . It is said that sheet music may consist of different characters or methods, as, for example, the 'sol, fa' method, and that the perforated strips of the defendant are simply another form of musical notation; but the reply to this is that they are not designed or used as a new form of musical notation.

". . . While it may not be denied that some

persons, by study and practice, may read music from these perforated strips, yet, as a practical question in the musical profession or in the sale of printed music, it may be said that they are not recognized as sheet music. The question is not what may be done as an experiment, but whether in any fair or proper sense, these perforated rolls of paper made expressly for use in a musical instrument, can be said to be copies of sheet music . . . I find no decided cases which directly or by analogy support the position of the complainants, and it seems to me that both by reason and authority, they have failed to show any infringement of their copyright."

The following decisions of the courts of Great Britain have finally determined the question there:

Boosey v. *Whight*, 15 T. L. R., 322 (April 19, 1899) 1 Ch., 836 (1899); 80 L. T. R. (N. S.) 561.

The case was identical with the present—a suit charging infringement of a copyrighted sheet of music by making and selling perforated rolls for playing it on an automatic instrument or player. The opinion of the court is so clearly reasoned that we reproduce it nearly entire.

JUSTICE STIRLING:

"It was admitted by the defendant's counsel that it is quite possible to prepare a key by which the notes corresponding to the perforations can be copied down, and in fact such a key has been prepared and applied to one of the pieces of music in question. (His Lordship here observed that no witnesses were produced who could read these rolls in the same way as an ordinary sheet of music, but that the defendant's witnesses had admitted that, although the rolls conveyed no idea of music to them, they could say the same of the tonic sol-fa notation or that used by the blind.) The result of the evidence appears to me to be that the information conveyed by the rolls to the mind of the reader, would to a sub-

stantial degree be the same as that afforded by a sheet of music in the ordinary notation, but would be in various ways less complete. It also appears to me that for this purpose the rolls constitute an extremely cumbrous system of writing music hardly available without the use of some mechanism which at present does not exist. I think it is improbable that any one would ever go to the trouble of acquiring the art of reading these rolls. No question arises as to the right of performance of these pieces under Sec. 20 of the Copyright Act 1842. What is in dispute, is whether the sale of these rolls constitutes an infringement of the copyright vested in the plaintiffs under the earlier part of the Act. . . . The contention of the plaintiffs is that the rolls are copies of a substantial part of what is found in the sheets published by them, though expressed in an unusual and somewhat difficult form of notation, and consequently that the sole and exclusive liberty of multiplying copies is infringed, just as the publication in shorthand of an ordinary piece of letter-press would be an infringement of the copyright therein; (see *Nicols* v. *Pitman* (*ubi sup.*) For the defendants it is urged that the rolls really form parts of the machine for the production of musical sounds, and that the Legislature in passing the Copyright Act showed no intention of interfering with such mechanism. In my opinion the latter view is in the main to be preferred. . . . The copyright conferred by that Act appears to me to be the exclusive liberty of multiplying copies of something in the nature of a book. The rolls so far as they contain perforations are in fact used simply as parts of a machine for the production of musical sounds, not for the purpose of a book. They are used as a means of appealing to the mind directly through the ear, not, as in the case of a book, through the eyes of an ordinary reader, or through the sense of touch in the case of a blind person. Some mechanical instruments for the production of musical effects, as, for example, the music box and the barrel organ, seem to have been well known in the last century long prior to

the passing of the Act in 1842. It was admitted by Mr. Scrutton in his able argument for the plaintiffs that, if the construction sought to be placed on the Act by them be sound, the cylinder of a musical box is a sheet of music within the statute. If this had been within the contemplation of the Legislature, I cannot but think that the framers of the Act, who were careful to point out what the word 'book' was to mean and include, would have been no less careful in explaining that the term 'sheet of music' was to mean and include something which would not fall within the ordinary acceptation of the words."

On appeal, the view of Justice Stirling was fully sustained as to the matter above quoted, and the court above went further and held that the expression marks and tempo marks on the perforated sheets did not constitute infringement.

LINDLEY, M. R., in his decision, says:

"The plaintiffs are entitled to copyright in three sheets of music. What does this mean? It means that they have the exclusive right of printing or otherwise multiplying copies of those sheets of music, *i. e.*, of the bars, notes, and other printed words and signs on these sheets. But the plaintiffs have no exclusive right to the production of the sounds indicated by or on those sheets of music; nor to the performance in private of the music indicated by such sheets; nor to any mechanism for the production of such sounds or music.

"The plaintiff's rights are not infringed except by an unauthorized copy of their sheets of music. We need not trouble ourselves about authority; no question turning on the meaning of that expression has to be considered in this case. The only question we have to consider is whether the defendants have copied the plaintiff's sheets of music.

"The defendants have taken those sheets of music and have prepared from them sheets of paper with perforations in them, and these perforated sheets, when put into and used with properly constructed

machines or instruments, will produce or enable the machines or instruments to produce the music indicated on the plaintiff's sheets. In this sense the defendant's perforated rolls have been copied from the plaintiff's sheets.

"But is this the kind of copying which is prohibited by the Copyright Act; or rather is the perforated sheet made as above mentioned a copy of the sheet of music from which it is made? Is it a copy at all? Is it a copy within the meaning of the Copyright Act? A sheet of music is treated in the Copyright Act as if it were a book or sheet of letter press. Any mode of copying such a thing, whether by printing, writing, photography, or by some other method not yet invented would no doubt be copying. So, perhaps, might a perforated sheet of paper to be sung or played from in the same way as sheets of music are sung or played from. *But to play an instrument from a sheet of music which appears to the eye is one thing; to play an instrument with a perforated sheet which itself forms part of the mechanism which produces the music is quite another thing.*" (Italics are ours.)

"I have consulted Johnson's, Richardson's, and Murray's dictionaries to ascertain the meanings attributed to the word 'copy;' and I do not myself think that the perforated sheet can be said to be a copy of the sheet of music unless the word 'copy' is used in a very loose and inaccurate sense. Be this as it may, I cannot think or bring myself to decide that the perforated sheet is a copy of a sheet of music within the Copyright Act. The fundamental ideas underlying them are different and the uses to be made of them are fundamentally different. Music appeals to the ear, but a sheet of music appeals to the eye, and the observation of Bayley, J., in *West* v. *Francis* (5 B. & A., p. 743), is applicable not only to engravings but to all kinds of books, and the Copyright Acts treats a sheet of music as it treats a book. He said: 'A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.'

"I do not say that the defendants' perforated rolls cannot possibly be regarded as sheets of music. They may possibly be so regarded by specially skilled persons who may have learned to read the perforations.

"Conceding for the sake of argument that a person might be trained to play or even to sing from the perforated sheets *it is clear that they were not made to be so used, nor are they ever so used in fact;* and we ought, in my opinion, to deal with the case on broad business lines and not on unpractical, though theoretically possible, assumptions. . . ." (Italics ours.)

"It may be true that the manufacture and sale of the perforated sheets diminish the sale of the plaintiff's sheets of music. But it does not follow that the plaintiff's copyright has been infringed; and I am of the opinion that it has not. I regard the defendants' perforated sheets as parts of a mechanical contrivance for producing musical notes; and I cannot think that manufacturers of musical instruments infringe any person's copyright by so constructing their machines and appliances to be used with them as to produce musical notes indicated on a sheet of music. On this broad and very important question —which, so far as I know, has never been raised before in this country—I am of the opinion that the decision of Stirling, J., is correct.

"There is, however, another but comparatively subordinate question on which I am unable to agree with him. He has restrained the defendants from copying the directions on plaintiffs' sheets of music to the person using them. The defendants' appeal from this part of the judgment ought, in my opinion, to succeed. The directions in the plaintiffs' sheets of music are no doubt protected by their copyright so long as they are used in connection with their musical scores. But, apart from those scores, the plaintiffs have no copyright in such directions. The directions are not in themselves a sheet of music, nor are they a sheet of letter-press separately published. Even if they were they would be mere

words, not sentences forming a literary composition in which copyright could be acquired. Upon this point the case is governed by *Hollinrake* v. *Truswell* (71 L. T. Rep., 419 (1894); 3 Ch., 420), and the injunction granted by Stirling, J., to restrain the use of these directions must be discharged."

Lord Justice Romer, concurring, added:

"The rights under the Copyright Act of an author of a musical piece are: (1) To prevent others from copying the published music regarded as a book; and (2) to prevent the music itself being performed in public without the author's permission.

"But any one may perform the music in private by voice, musical instrument in the ordinary sense such as violins, piano, and so forth, or by any mechanical instrument.

"And seeing that mechanical instruments for producing musical sounds were well known at the date of the Act, I think that the Legislatture never contemplated that the author's rights to multiple copies of published music would entitle him to stop the use in private of such an instrument because it performed the published music.

"Of course I am now speaking of the mechanical musical instruments known at the date of the Act. But those instruments were numerous and included, for instance, musical boxes. The Act, to my mind, never contemplated that the cylinder of a musical box, taking that as one of the best known mechanical instruments, could be regarded as a copy of the printed music, even though an accomplished musician might be able by inspection of the cylinder to gather from it the notes of the music.

"Now, in the case before us, the sheets which are said to be copies of the plaintiff's published sheets of music were issued only for the purpose of being used as parts of a mechanical musical instrument to produce musical sounds. And as a matter of substance, the defendants' sheets have in fact only been used by those to whom they were issued for the sole purpose for which they were in fact issued.

"But it is said that they could be used so as to answer the same purpose as copies of the plaintiffs' printed music, and that therefore they ought to be regarded as copies within the Act. To my mind, it does not of necessity follow that because a thing might be so used as to answer the same purpose as a copy of a book it must be regarded as a copy within the Act.

"But, passing that by, I deal with the question before us as one of substance, and I ask myself whether in substance and in any practical view the defendants' sheets could be so used as to answer the purpose of copies of the plaintiffs' musical sheets. On the evidence in the case I *agree with my brother Stirling that this question must be answered in the negative*. And I think that that really disposes of the appeal. . . . And I may add, at the risk of repeating what I have already said, that the plaintiffs' sheets and the defendants' sheets are issued and used for substantial different objects. The plaintiffs' sheets are issued and used as books to be read. The defendants' sheets are issued and used not as books to be read, but as parts of a mechanical musical instrument to produce the sounds of music."

Lord Justice Romer also concurred in the above quoted opinion of the Master of the Rolls that the expression marks on the perforated roll did not constitute infringement, saying as follows:

"I think that no substantial part of the plaintiffs' books—that is, of their printed musical sheets—has been copied by the defendants. So far as words have been taken from the plaintiffs' book and put on the defendants' sheets, they have no use or connected meaning by themselves and are only of use on the defendants' sheets in any practical point of view as directions for working the defendants' mechanical instrument to produce musical sounds."

Counsel for complainant will assert that the British

statute confined the court to a narrower question than the one which they will contend is involved or raised here, because of use in the statute of the term, "sheet of music." But it will be noticed that the decisions are not reasoned and do not proceed upon such narrow ground—See Lord Justice Lindley's language above quoted: *"No question turning on the meaning of that expression has to be considered in this case."*

Also it is noticable that in those decisions greater legibility was assumed for the perforated rolls than has been proven in this case.

Notwithstanding the attempt to minimize these decisions, it is submitted that the reasoning by which they were reached is sound and irrefutable. It will not fail to be noticed that they ignore all of the fine-spun definitions and metaphysical considerations upon which complainant seeks to found the conclusion contended for here, and that the conclusion announced is reached by the direct common-sense road which would be taken by an ordinarily intelligent business man desiring to govern his action by the probable law applicable thereto.

But the United States statutes, although using the term "musical composition" as the name of the particular article the subject of copyright, clearly indicate in frequent secondary references to the article, that it is a *"sheet"* or something composed of *"sheets"* which is indicated by the term of "musical composition" used in Sec. 4962.

The Act of February 3, 1831, is the first copyright act in which *"musical composition"* is expressly made subject of that copyright. Prior to that time, if included at all, it was under the general term of "book." The right is given in the following language:

"The author or authors of any . . . musical

> composition . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such . . . musical composition . . . in whole or in part for the term of twenty-eight years," etc.,

and in Section 5 of the Act it is provided that no person shall be entitled to copyright unless copyright notice shall be inserted

> " in the several copies of each and every edition published during the term secured, *on the title page* or page immediately following, if it be a book; or if it be a . . . musical composition . . . by causing it to be impressed on the face thereof; or if it be a . . . of . . . music or . . . upon the title or frontispiece thereof."

Since the only things that could be copyrighted under this statute would be something which could be marked as provided in Section 5 above cited, and since the only "musical compositions" which could be thus marked would be things having a "face thereof" or having a "title or frontispiece thereof," it is evident that Congress had in mind in the term "musical composition" something of the nature of a sheet or page.

Section 7 of the same statute provides that

> " if any person or persons after the recording of the title of any . . . musical composition . . . shall print or import for sale, or cause to be printed or imported for sale, any such . . . musical composition . . . or any parts thereof . . . then such offender shall forfeit . . . all and every *sheet thereof* so copied or printed . . . and shall further forfeit $1.00 for *every sheet of such* . . . *musical composition* which may be found in his possession printed or published or exposed for sale."

This penalty for infringement can be available only if the thing to which it relates is in "*sheets*."

The Copyright Act of 1870 retains the same form of secondary mention of musical composition, indicating that it is conceived of under the form of sheets or things consisting of sheets. For example, Section 100 provides as the penalty for infringement of "musical composition," the forfeiture of

> "*all the plates on which the same shall be copied, and every sheet thereof either copied or printed,*" and ". . . *$1.00 for every sheet of the same found in his possession* . . ."

The Act of 1891, which, with some amendments, constitutes the present law, contains the same provisions in substantially the same language as the Act of 1870, above quoted. Section 4965 (amended without change in the respects indicated by the Act of March 2, 1905, and now in force), for example, provides that—

> "If any person after the recording of the title of any . . . musical composition . . . shall within the term limited, contrary to the provisions of this Act, and without the consent of the proprietor of the copyright first obtained in writing . . . sell or expose for sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof, either copied or printed, and shall further forfeit $1.00 for every sheet of the same found in his possession, either printing, printed, copied, published or exposed for sale."

In the phrase, "map or other article," the words "other article" must take in all other subjects of copyright mentioned in the opening clause of the section, and must therefore include musical compositions; if not, then there is no penalty provided in the section for the infringement of musical compositions. But obviously the phrase, "article," was intended to include a musical composition,

which is therefore to be understood as something printed *on sheets*, sold *in sheets*, possessed *in the form of sheets*, and for which $1.00 penalty may be assessed at the rate of $1.00 *per sheet*.

The British statute, therefore, is in fact not nearly so specific, or certain in its intent to be specific, as the United States statutes from first to last, to the effect that the thing protected under the name of music is a *sheet* of music, or *sheets* of music, or music printed in *sheets*.

VII.

The Real Equities Involve the Real Parties.

Does the Real Complainant Come Into Equity With Clean Hands?

The maxim that the complainant must come into equity with clean hands is almost as old as equity courts themselves. It is universally recognized, but, as in most other questions, the difficulty is in its application.

The maxim has been applied in all its force in trade-mark or trade-name cases, one of the latest decisions of the United States Supreme Court being *Worden* v. *California Fig Syrup Co.*, 187 U. S., 517, decided in October, 1902.

This decision is only the culmination of a long line of cases, both in the Federal and State Courts, laying down the rule that in such actions, even though the infringement by the defendant be clear, the plaintiff will not get any relief in equity if he himself has made any material false representations regarding his trade-name or trade-mark or the quality of his goods.

One of the leading cases in New York on that subject is

Prince Manufacturing Co. v. *Prince's Metallic Paint Co.*, 135 N. Y., 24, which was cited with approval in the Worden case.

We ask to have the maxim applied in the case at bar upon the following grounds:

That prior to the commencement of this action a concern known as the Aeolian Company of New York, had obtained from the plaintiff herein, and every other music publisher of any importance in the United States, an exclusive thirty-five year contract, whereby each of those publishing houses, including the plaintiff, bound itself for the said period of thirty-five years to give to the said Aeolian Company the exclusive right to cut perforated rolls from the compositions owned or controlled by it then or at any time during the contract's duration; that these music publishing houses control the output of the great bulk of current copyrighted music in the United States; that the contract further provided that the Aeolian Company was to institute and maintain this suit at its own expense, and it was only *in the event of its success in this suit* that the exclusive contracts would come into operation.

We contend that the object of these contracts was to deliver into the hands of the Aeolian Company a complete monopoly of the perforated roll business in this country, and through that monopoly obtain resultingly a complete monopoly of the piano player or automatic piano business, and *that this suit was instituted for no other purpose.*

We have found no case in the Supreme Court of the United States in which this exact question has been involved, nor have we found any such case in any of the federal courts.

A somewhat analogous question has come up in a number of cases in the federal courts, however, namely, cases

where a patent infringement suit was sought to be defeated upon the ground that the complainant was a party to an unlawful combination, which attempted through holding of patents to obtain a control of the particular line of business.

One of the earliest was *Straight* v. *National Harrow Company*, 51 Fed. Rep., 819, decided by Judge Wallace, sitting in the Circuit Court for the Southern District of New York in 1892.

Judge Wallace declined to consider such a defense, holding that the only question in the case was whether complainant owned the patent and whether the defendant infringed it.

Later that year, however, this same question came before the Circuit Court of Appeals for the Second Circuit, in *Edison Electric Co.* v. *Sawyer & Man Co.*, 53 Fed. Rep., 592.

The court consisted of Judges Wallace, Lacombe and Shipman, although the opinion is *per curiam*.

The patent upon which that suit was brought had been declared valid in a former suit. The defendants now set up that the plaintiff was one of a number of concerns which had come into a combination or trust, so-called, known as the General Electric Company, which constituted an unlawful combination in restraint of trade. On this point the court said:

> "We are not disposed to investigate, upon the present case, the character of the combination which has been formed in the name of the General Electric Company, whether that combination is intended to fetter competition and is illegal as one in restraint of trade, is a question which we should not undertake to decide *upon the evidence before us*, and in a suit to which it is not a party. The present complainants are entitled by the patent laws to a mo-

> nopoly, for the term of the patent, of the manufacture and sale of the lamps made under it. The right to this monopoly is the very foundation of the patent system. They do not lose that right merely because they may have joined in a combination with others, holding other patents securing similar monopolies, which combination may, *when judicially examined in a proper form*, be held to be unlawful. We do not feel justified in assuming upon the facts before us in the present suit, that the use which the complainants propose to make of the injunction—an injunction which seems necessary to secure their monopoly and make the patent fruitful—will be such as to produce any *other* monopoly. When it shall be made to appear that someone to whom, in fairness and good conscience, these complainants should sell their lamps, has been arbitrarily refused them, save upon oppressive and unreasonable terms, it will be time to consider whether the complainants should be allowed to continue in possession of the injunction." (Italics ours.)

And the opinion further directed that the decree should contain a provision reserving to the defendant the right to move to modify the injunction or vacate it *upon the happening of such event*.

This is not a denial of the right or power of an equity court to refuse the application of the maxim in a patent case where an unlawful combination is alleged. It simply decided that *on the facts befor it* the court did not feel justified in applying the maxim. Reading between the lines, we submit it is a fair assumption that had the court been satisfied that such would be the result, then the injunction would be denied.

While there were allegations and proofs in that case tending to show that the plaintiff was one of the firms which had gone into a large combination known as the General Electric Company, and there were proofs tend-

ing to show that the effect of that combination might be to create a monopoly, still there was no such fact there as there is in this case, namely, that *the contract itself provided for the institution and prosecution of the suit for the purpose of seeking to establish a monopoly.*

In *National Harrow Co.* v. *Quick*, 67 Fed Rep., 130, which was a suit for patent infringement and was heard by Judge Baker in the Circuit Court for the District of Indiana in 1895, this defense of unlawful combination was set up. In passing on it Judge Baker said:

> "It seems to me that such a combination is illegal and that its purposes are violative of sound public policy. The common law forbids the organization of such combinations, composed of numerous firms and corporations. They are dangerous to the peace and good order of society and they arrogate to themselves the exercise of powers destructive of the right of free competition in the markets of the country, and by their *aggregate power* and influence *imperil* the free and pure administration of justice.
>
> "Complainant says that its title to the patent in question is valid and that it has a lawful right to its protection from invasion by a stranger, regardless of the objects and purposes of the combination which it represents. On the other hand, the defendants contend that to give its title possession would be to give aid to the unlawful purposes of the combination. In suits at law it is doubtless true as a general proposition that a wrongdoer will not be permitted to dispute the legal title of one in possession of money or property by showing that the title thereto was unlawfully acquired, or that the owner intends to apply it to an unlawful use. I have strong doubts whether this rule ought to apply to a suit in equity where nothing but *clean* hands and a *good conscience* will move the court to act. The combination represented by the complainant is not illegal in any sense except that the law will not lend its aid to the accomplishment of its purposes. The common law

does not prohibit the making of such combinations. It merely declines, after they have been made, to recognize their validity by refusing to make any decree or order which will in any way give aid to the purposes of such combinations. It seems to me that the court cannot sustain the present bill without giving aid to the unlawful combination or trust represented by the complainant. The question is not free from doubt, but in a case of doubt I feel it my duty to resolve it in such a way as will not lend the countenance of the court to the creation of combinations, trusts or monopolies. They have already grown to alarming proportions, and courts, to the full extent of their powers, ought to discountenance and repress them."

National Harrow Company v. *Hench*, 76 Fed. Rep., 667, was an action brought by the same company against one of the parties to the agreement to restrain that party from selling goods at lower prices than those mentioned in the agreement. The court declined to grant an injunction.

On appeal, 83 Fed. Rep., 36 (Third Circuit), the court said:

> "Patents confer a monopoly as respects the property covered by them, but they confer no right upon the holders of several distinct patents to combine for the purpose of restraining competition in trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself of several patents, and thus increase his monopolies, affords no support for the argument in favor of a combination by several distinct owners of such property to restrain manufacturers, control sales and enhance prices. Such combinations are conspiracies against the public interests and the basis of patent privileges."

And so in the case at bar the contracts in question and the whole scheme whereby this suit was instituted is a

conspiracy against the public interest and against the whole copyright system.

In *National Harrow Company* v. *Hench*, 84 Fed. Rep., 227, this same complainant having failed in the suit on the contract itself in the Third Circuit, brought an action against the same defendant in the Northern District of New York for infringement of patent. It alleged that this patent was originally issued to Hench, and by him assigned to the complainant, and that he had infringed, etc. The defendant set up the defense of unlawful combination, as in the Third Circuit suit. Judge Coxe, after discussing the decision in the Third Circuit, denied the injunction, holding that the combination was unlawful and that the assignment made thereunder was invalid, and that it would be an insult to jurisprudence to permit an injunction in this form of action, where it had been denied in the other. In other words, Judge Coxe holds that an action upon the patent itself, after the unlawful agreement has been judicially held to be unlawful, will not be permitted. If that is so, why should not the court, as an original proposition, take up both questions at the same time, viz., examine into the validity of the agreement, and if it decides upon its unlawful character, then refuse relief to anybody who is a party to it?

In this case, the nominal plaintiff is the White-Smith Company. The real plaintiff, and the one who is paying the expenses, is the beneficiary under the unlawful agreement.

In the case of *National Folding Box Co.* v. *Robertson*, 99 Fed. Rep., 985, Southern District of New York, Judge Townsend seems to disapprove of such a plea, although he says that the "conclusions reached dispense with the necessity of resting the decision on the illegality of the

agreement alleged in the plea in abatement," because, he says, from its own terms, it does not seem to be illegal. He seems to disapprove the cases in which a different conclusion was reached or intended, and points out that Judge Coxe, in the case above cited, based his decision upon the fact that the assignment of the patent itself was invalid.

It is submitted, however, that the better position is that if the contract in question was intended to create a monopoly, if it can be clearly seen that its effect would be to create a monopoly, then the courts will not grant relief, especially where it appears *that the suit itself was instituted for the specific purpose of making the monopoly complete and certain.*

It may perhaps be said, in answer, that the record in this cause does not clearly establish the foregoing facts. That may be true, owing to the inability to prove such facts directly at the time when the testimony was being taken in these causes. The record contains, however, photographic copies of those contracts, which we claim to be unlawful, and a photographic copy of a letter written by the Aeolian Company to one of the other contracting parties, before the commencement of this suit, informing the other parties that it now had a sufficient number of contracts and therefore called them all into operation.

This hiatus in proof, however, if it exists, can be supplied by a reference to the proceedings had before the Joint Committee on Patents and Copyrights of the Senate and House in June, 1906, and again in December, 1906, on a Copyright Bill then and now pending before Congress. It was there shown quite conclusively that there was an organization known as the Music Publishers Association, which included practically all the publishers of any importance in the United States; that there were

be presumed that the investment of the present millions of capital has been made, and the business energy, skill and industry of the thousands of persons now engaged in these lines of production, been expended.

Stare Decisis.

This doctrine—the bulwark of protective conservatism, the foundation of confidence in established usage, the assurance against vacillating jurisprudence, without which the confidence necessary to the building up of business enterprises on secure foundations would never be born—it is believed never found clearer justification than the present cases afford.

It is more important, often, that the law should be known than that it should be theoretically or ideally correct. It matters little whether the law requires the endorsement of a note to be made in one form or another, but it matters much that the commercial world know in what form the law requires such endorsement to be made.

It would have mattered little at the inception of the art and business enterprises involved in these suits whether perforated rolls were or were not covered by music copyrights, but it matters *all* that the law which has in fact governed and guided in the creation and development of the art and business of making and using such rolls, and by which the rights of the parties concerned therein have been measured while they were investing their capital and energies in it, should be known, and being declared and observed, should not be disturbed thereafter.

In 1 Kent's Commentaries, page 476, the Chancellor lays down the rule of *stare decisis* as follows:

> "If a decision has been made upon solemn argument and mature deliberation, the presumption is in

favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public, if precedents were not truly recorded and implicitly followed. And it is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture with confidence to abide and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disrupt and unsettle the great landmarks of property."

Further on the learned Chancellor relates how Lord Mansfield made many innovations in the law merchant in England, and then goes on to say how Lord Kenyon "acted like a Roman Dictator appointed to recall and reinvigorate the ancient discipline" by turning the line of decision into the old channels which had been departed from by Mansfield.

Then the learned Chancellor proceeds to say at page 478:

> "The English Courts seem now to consider it to be their duty to adhere to the authority of adjudged cases when they have been so clearly and so often or so long established as to create a practical rule of property, notwithstanding they may feel the hardship or not perceive the reasonableness of the rule."

The rule, as thus enunciated by Chancellor Kent, has always been quoted with approval by the American courts. There have been intimations contained in some of the cases, however, in the Western States to the effect that a decision cannot be the basis for an application of the rule, unless it be a decision of the highest Appellate Court in any particular jurisdiction. If the reason for the rule is that given by Chancellor Kent, viz., a solemnly argued cause and mature deliberation thereon, followed by an

acquiescence in that decision for many years, it would seem to follow that it is not a prerequisite that the argument should be made before, or the decision handed down by a court of last resort.

The object of this rule is to settle the law so that people may rely on its stability and that lawyers may properly advise.

If a lower court makes a decision after mature deliberation and solemn argument, and that decision has been universally relied upon, both by the Bar and the public, and that decision has stood for many years and there is no decision *contra or questioning it*, it is submitted that such a decision may have the force of *stare decisis* exactly the same as if it had been made by the highest court in the land.

There are two cases in the Federal Courts in which expressions occur tending to a contrary interpretation of the rule, and those cases are—

American Mortgage Company v. *Hopper*, 64 Fed. Rep., 554.

The Madrid, 44 Fed. Rep., 467.

When those cases are examined, however, they do not in reality disagree with the above contention.

In the American Mortgage Company case, which was argued before the Circuit Court of Appeals for the Ninth Circuit in 1894 (of which Mr. Justice McKenna was then Circuit Judge), the rule of *stare decisis* was sought to be invoked because of a decision given in the District Court of Appeals.

It appeared that that decision was at variance with the decisions in other districts of the Circuit, and also at variance with the decisions in other of the Circuit Courts throughout the country.

In refusing to follow the decision cited, the court said:

> "When the courts of last resort have announced principles affecting the acquisition of title to real estate, and the principles thus announced have long been established, frequently recognized and confirmed, and property rights have been acquired thereunder, it has been generally held that such decisions should not be overturned, although the principles announced therein might otherwise be questioned; but our attention has not been called to any decided case directly upon the question here involved, and, from the diligence of counsel in citing cases upon other points, it is extremely doubtful if any could be found, where the doctrine of *stare decisis* has been applied to the decision or decisons of a Circuit Court of the United States from which no appeal was taken. There are seven districts in this Circuit, and it would be a strange doctrine to advance, if the decisions in the different districts were not uniform, that this court would be bound to adhere to such decisions in each district because a rule of property was involved, without regard to the merits of the case."

Judge Hawley wrote this opinion, which was concurred in by Judge McKenna, and the court cited with approval the case of *The Madrid* above cited.

In *The Madrid*, decided in the Circuit Court for the District of Louisiana in 1889, the opinion was written by Mr. Justice Lamar, and concurred in by Judge Pardee.

The question there was one of maritime lien, and the main point was whether the same rule applied to fresh-water navigation as to oceanic navigation.

The opinion of Judge Lamar on this question of *stare decisis* states the points as follows:

> "Counsel for the mortgagees rely mainly upon the doctrine of *stare decisis* to support the claim of their clients. Their contention is that the rule of law heretofore announced in this Circuit Court should stand, because as they assert, rights of property have been

acquired under it, and vested right will be disrupted by the change. On the other hand it is strongly insisted by counsel for the material men, that the decisions of this court upon the general questions under consideration are erroneous and should not be followed. It is claimed that the lien given by the state statutes for supplies, etc., furnished a domestic vessel, stands on an equality with those liens arising under the general maritime law of supplies and so forth furnished a foreign vessel.

"The rule of *stare decisis* means in general that when a point has once been settled by judicial decision, it forms a precedent for the guidance of courts in similar cases. It explains the principle upon which rests the authority of judicial decisions as precedents in subsequent litigation. This rule should in the main be strictly adhered to. And adherence to it is necessary to preserve the , the stability and the symmetry of our jurisprudence. Nevertheless, there are occasions when a departure from it is necessary in order to vindicate plain and obvious principles of law and to remedy a continued injustice. These are the two grounds of justification in departing from a decision which has become a precedent. THE DECISIONS OF THE CIRCUIT COURTS OF THE UNITED STATES, NOT BEING UNIFORM UPON THE GENERAL QUESTIONS AT ISSUE IN THIS CASE, it can hardly be said that any of them has become a rule of property within the principle of the doctrine of *stare decisis*."

Mr. Justice Lamar, in this case, does not say that a decision of the Circuit Court cannot become *stare decisis*. On the contrary, he says, inferentially, that it may. He says that in the case before him the former decision in the Louisiana District cannot be considered *stare decisis*, because the other Circuit Courts throughout the country had adopted a general rule, and therefore it could not be considered as being the established principle of the law throughout the country.

Both of those decisions are of course correct. In the Federal Courts a decision cannot be considered as having the force of *stare decisis* unless it lays down a rule which is followed *all over the country*. The fact that it may be a rule of property in one particular district does not give it that force and effect. What gives it the force and effect of *stare decisis* is the fact that it is recognized and has been for years all *over* the United States as establishing the law on a particular subject.

That is the force and effect of the *McTammany* case. Decided by Judge Colt in the District of Massachusetts in 1888, after solemn argument and mature deliberation an appeal was taken by the complainant to the United States Supreme Court, and that appeal was afterwards dismissed because of failure of the complainant to comply with Rule 10. (See 145 U. S.)

Learned counsel do not, as a usual thing, after taking an appeal to the Supreme Court, permit a dismissal for failure to print unless they have come to the conclusion that the appeal is hopeless.

When we consider the carefulness of Judge Colt's opinion in connection with this appeal and dismissal for want of prosecution, while it is not of course a decision of the Supreme Court affirming Judge Colt, it shows an acquiescence by counsel in that case in the decision of Judge Colt, which acquiescence, it is fair to assume, came from the belief that the Supreme Court would inevitably affirm Judge Colt's decision.

When it is further considered that the counsel for the complainant and appellant in that case was Mr. Causten Browne, who had a wide experience for many years in copyright cases, we contend that the whole published record of this McTammany case was a warning to the

Bar and through them to the public at large, that a perforated sheet was not an infringement of the copyright and that Judge Colt's decision was the law of the land.

The fact that the law reports all over the country since that time show only one other case in which a kindred question was involved, viz., that of *Stearn* v. *Rosey*, decided by the Supreme Court of the District of Columbia in 1901, and which subscribed to and affirmed Judge Colt's decision, proves that the doctrine therein laid down has ever since been given, by the Bar and the public at any rate, the force of *stare decisis* and has been adopted by the Bar and the public as a rule of property.

Which Will Cause the Greater Injury?

The doctrine of *stare decisis* calls for an adherence to promulgated decisions unless greater injury would result from sustaining than from reversing them.

Which course would cause the greater injury in the present instance cannot be in doubt under the facts appearing. The present art of automatic instruments and the business of manufacturing them, and the business of manufacturing the perforated rolls necessary to their use would be exposed to ruin by the reversal now of the generation-old decisions, in reliance upon which the business has been developed.

The particular conditions which will cause this result to flow from such reversal, furthermore, have been made possible by these very decisions, for the substantial monopoly of the manufacture of perforated rolls and automatic musical instruments using them, which will be the inevitable result of the monopoly which the Aeolian Company, the real complainant herein, will acquire by such reversal, will result from the contracts which have been

obtained so easily, largely because the condition of those contracts going into effect—the reversal of all prior decisions—seemed so hopeless in view of the universal confidence in them entertained by all interests concerned.

So much for the injury which would follow from the reversal of the accepted interpretation of the law.

On the other hand, the following facts will readily appear without specific testimony:

Prior to the judicial decisions mentioned, the possibility of revenue to composers by perforated rolls, by royalty on their copyrights, was not sufficient to constitute an appreciable element in the motive for obtaining copyright, the sale of such rolls being relatively small.

Since those decisions musical copyrights have been taken out in view of the law as therein announced, and with the understanding, therefore, that copyright did not cover perforated rolls.

No injury or disappointment of revenue to composers will result, therefore, from sustaining those decisions, and no advantage can of any sort to compensate for the immense injury which will be undoubtedly caused.

Somewhat closely related to the foregoing is the following consideration, which will be obvious, to wit:

The complainant's contention is not advanced on behalf of the composers, since they will not benefit by the result which the complainant seeks, for the reason that these composers have already, with very few exceptions, parted with their copyrights to the publishers who have acquired such copyrights *under the status of these former decisions, and therefore without taking into consideration in the price paid, any value which said copyrights might have as covering perforated rolls.*

In this phase the complainant is prosecuting stale

claims which the prior decisions gave an opportunity to acquire without consideration.

If the doctrine of stare decisis is not strictly applicable, under the technical definition of that doctrine, by reason of the fact that the prior decisions in this country were not decisions of courts of last resort, still the principle underlying that doctrine demands adherence to the prior decisions under the facts appearing here.

This underlying principle is closely allied to the estoppel.

That the business community has confidently relied upon the decision in *Kennedy* v. *McTammany* and others fortifying it, and that those concerned on both sides of the question have accepted as the law for all parties affected by it, the proposition that perforated rolls as parts of automatic machines are not to be considered as infringements of copyrights on the musical compositions which they produce, is evidenced by the fact that in the *fifteen years* subsequent to the rendering of that decision, and prior to the commencement of this suit, no suit was commenced nor demand made based upon any contrary view or contention; nor does it appear that the question was agitated until the Aeolian Company, the largest manufacturer of perforated rolls, finding a motive in the possibility which it conceived of monopolizing this large and rapidly growing industry, proposed to the music publishers the coalition indicated and consummated in the contracts, were offered an opportunity to have the question re-opened and litigated without a dollar of expense on their part.

The acquiescence of the music publishers and composers for fifteen years in the doctrine as laid down in

Kennedy v. *McTammany*—such acquiescence being without protest or the effort to reopen the question—is a fact which in this case has a certain legal force, and which has peculiar force and pertinence in view of the fact manifest in the record that this suit is only brought even now under the contract between the Aeolian Company and these publishers, so that the music publishing trade at large which had acquiesced for fifteen years in the only decision ever rendered on the point, is the real beneficiary, represented by the nominal complainant in this suit.

The business world was entitled to build upon it. Not only those whose favor it sounded, but also the publishers and composers and copyright holders against whom it sounds, apparently have built upon it. Both sides and all upon both sides of the question have acted as if it were the law, or have remained inactive in the premises, as if it were the law, for half a generation. That such action on the one side and inaction on the other side has been due to the acceptance of this decision as law is a fair inference. That the millions of dollars invested in the manufacture of perforated rolls have been invested upon the faith in this decision as law, is a fair inference.

The hundreds of publishers who have seen this business growing, and have not only been silent as to any claim of right to monopolize it under their copyrights, and who have furthermore assisted in its growth by seeking to have their publications popularized by being cut in perforated rolls for use in automatic playing machines without compensation to them, have created a status which is scarce less than a status of law; and this court will not be doing full justice if this status thus created is disregarded or held irrelevant to the question before it.

Nothing but the most unmistakable requirements of justice would warrant disturbing a status so created and maintained and fortified by such acquiescence for such length of time.

If it were merely a balanced question upon express authorities, such a status, although it were of much shorter standing, is a fact which should turn the scale.

Even if the authorities upon collateral or parallel or *quasi* parallel questions, tended logically to a decision opposite to that reached in *Kennedy* v. *McTammany*, yet the fact that on this specific question as applied to this specific art, the business community has been entitled to govern itself by that decision for seventeen years, should offset a very appreciable weight.

Much more, then, should that decision, fortified by the decision in respect to the graphophone in *Stern* v. *Rosey*, and by the decisions of British courts reasoned on the same lines and in respect to similar and similarly construed statutes, be held at this stage controlling and conclusive in this case.

The parties complained of in these suits for infringement of copyright, and all those manufacturers whose interests are involved with those of the defendants in the attack made by these suits, have from the first been proceeding in all that for which they are complained of strictly within their rights as laid down by every judicial decision bearing upon the questions involved or dealing with the principles involved. The probability of the correctness of these decisions have been fortified by the concurrent decisions of courts abroad. There has been no dissent. **The universal judicial voice has advised them that they were building upon their undoubted rights.**

If these defendants had come into this court with no other defense than this,—that they had built their business upon an unbroken line of judicial decisions directly involving and determining the propositions here involved, and that they had done nothing except what the courts had unanimously told them they had unqualified right to do, nothing but what the whole English speaking world has judicially determined as within their rights, and what the whole family of literary nations of Europe had by solemn convention agreed upon as right and expedient,—if they had rested there and had shown to this court no reason whatever why these decisions ought to have been rendered as they were, no reason whatever why the law should have been laid down as the courts have laid it down,—they might reasonably rely upon the equity of that position and expect this court to relieve them from all liability, whatever might be the opinion of the court as to the original rightness or wrongness of the antecedent decisions, or whatever this court might be disposed to do if it could act as the Legislature, and for the future only, instead of as acting as it must, judicially and with respect to the past.

There could be no greater or more palpable injustice, it is earnestly contended, than for this court, by overruling all the decisions upon which the business here involved has been built, to practically enact an *ex post facto* law involving these manufacturers in ruin as a reward for their years of meritorious development of a valuable art.

But it is confidently believed that this court will not find it necessary to do any violence to any conclusions which it would have been disposed to reach if the questions before it were presented at the inception of the busi-

ness to be affected thereby instead of at the meridian of its development; but that rather the principles and considerations which have been found controlling by all the courts of English speaking peoples which have heretofore considered the matter will be found equally controlling and conclusive by this court and will warrant it in finding, not only that the former decisions should not be reversed under all the circumstances, but that they were right when made and that copyrights upon musical compositions are not infringed by the mechanical adjuncts of automatic musical instruments, known in this record as perforated rolls.

IX.

Every enactment of Congress is properly interpreted by reference to establish public policy and then known existing conditions.

The existence at the time of the enactment of the United States copyright law of 1891, of the Berne convention of 1886 compels the conclusion that said law of 1891 was not intended by Congress to subject perforated rolls to copyright.

The Act of 1891 became a law in this country subsequent to the last International Copyright Convention at Berne. That convention was completed on the 9th day of September, 1886, and specifically provided as follows:

> "It is understood that the manufacture and sale of instruments serving to reproduce mechanically the airs of music borrowed from the private domain are not considered as constituting musical infringement."

Among the countries taking part in that convention were the British Empire, the German Empire, France,

Switzerland, Belgium and Italy. The United States did not participate nor has it since became a party to any international conference on copyright.

Our Act of 1891 was intended to be to a certain extent an international copyright law, and to conform as near as may be to the conclusions arrived at in Berne. It provided that the citizen or subjects of foreign states might have, under certain conditions, the benefit of copyright in the United States. All of the copyright acts prior to this Act of 1891 expressly limited the protection of copyright to citizens of or residents in the United States; and the most striking change made in the copyright laws by the Act of 1891 was as follows:

> "SEC. 13. That this Act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefits of copyright on substantially the same basis as to its own citizens; and when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States by proclamation made from time to time as the purposes of this Act may require."

Subsequent to the passage of the Act, and on the 1st of July, 1891, President Harrison made a proclamation as provided in Sec. 13 of the Act, in relation to Belgium, France, Great Britain and her possessions and Switzerland, which says as follows:

> "And whereas satisfactory official assurance has been given that in Belgium, France, Great Britain and the British possessions and Switzerland, the law permits to citizens of the United States the benefit of

copyright on substantially the same basis as to the citizens of those foreign countries."

And thereby President Harrison called into operation the first provision of Sec. 13 of the Act of July 1, 1891, in relation to citizens or subjects of those countries.

On April 15, 1892, President Harrison made a similar proclamation regarding the German Empire, and annexed to his proclamation a copy of the agreement made with the German Empire.

On October 31, 1892, a similar proclamation was made as regards Italy.

Now at the time of making these proclamations the copyright law governing musical compositions in those countries was that set forth in the Article quoted from the Berne Convention, viz., that the manufacture and sale of instruments serving to reproduce mechanically the airs of copyrighted music did not constitute a copyright infringement; and it must be presumed, in view of the provisions of the Act itself and of the successive proclamations of the President pursuant thereto, that, when Congress passed this so-called International Copyright Act on March 3, 1891, it had before it the decision arrived at in respect to musical copyrights by the Berne Convention.

All this being so, it follows that Congress, in enacting into a law the Copyright Bill of 1891, did not intend that the manufacture and sale of instruments serving to reproduce mechanically the airs of music should be an infringement of copyright, or else that, reversing the established policy of protecting home products, it intended to give foreign composers an advantage here which our composers are denied abroad.

Judicial Decisions Abroad Enforce the Same Conclusion.

Independently of the Berne Convention, the English Court of Appeals has decided that a music roll is not an infringement of the copyrighted sheet of music. *Boosey* v. *Wright, supra.*

Since then two Copyright Acts have been enacted in England, viz., one in 1902 and the latest in August, 1906. This latter Act in express terms excludes all reproducing devices from the domain of copyright.

The French courts have decided that a music roll is not an infringement of the copyrighted sheet.

Massent & Puccini v. *Pathe Freres,* decided Feb. 1, 1905. (See separate pamphlet.)

The Supreme Judicial Court of Belgium has decided that a music roll is not an infringement of the copyrighted sheet.

Massent v. *Puccini,* v. *Pathe Freres,* decided May 2, 1907.

A German court in 1900 decided that a talking machine record was an infringement of the copyright.

See separate pamphlet; also record of copyright hearings.

And at the very next session of the Reichstag a bill was passed which in specific terms repudiates the decision of that court and provides that no device for mechanically reproducing music shall be considered an infringement of the copyright.

The only judicial decision holding that a mechanical device for reproducing musical sounds is an infringement of copyright is that of an Italian court, which is now on appeal.

Ricordi v. *Gramophone Co.,* Milan, July, 1906. Judicial Acts, Vol. 390, No. 931.

In order to arrive at such a decision the Italian court specifically repudiated the action of the Italian delegates to the Berne Convention of 1886, and specifically repudiated what was done at that convention. It justifies itself by alleging that the delegates to the convention were appointed by the Crown, and that the results of the convention were ratified by royal decree and not by Parliament. The court states in the opinion that the provision quoted above from the Berne Convention was inserted at the urgent solicitation of Switzerland, which country, it is said, wished to protect its music-box industry. It proceeds, therefore, to argue that if that clause was inserted because of a *selfish* motive on the part of Switzerland, namely, the protection of its industry, Italy should *repudiate* the convention from a similar selfish motive, viz., the protection of a great Italian industry, namely, composing.

This decision is now on appeal to the highest court in Italy.

The conditions, therefore, obtaining abroad since the last Berne Convention of 1886, are:

1. That the countries which sent delegates to that convention bound themselves to the principle that mechanical devices for reproducing the sounds of music are not infringement of a musical copyright.

2. Great Britain, France, Belgium and Germany, either by judicial decision or legislation, or both, have reiterated their adherence to that principle.

3. Italy, by a judicial decision, which has been appealed from, has sought to repudiate the action of the Berne convention upon the ground that it was passed because of a selfish motive on the part of the Swiss Republic, and that Italy ought to repudiate it from a similar selfish motive.

If, notwithstanding the various proclamations of President Harrison, the provisions of the Act of 1891 itself, and interpreted in view of the conclusion of the Berne Convention of 1886, which must certainly have been known to the Congress which passed this copyright act, it is still contended that this Act of 1891 intended to make a perforated roll an infringement of a copyright on a musical sheet, then we have the following situation:

(*a*) Citizens or subjects of Great Britain, France, Belgium and the German Empire may obtain a royalty *in this country* on perforated rolls cut from their compositions, *but not in their own countries.*

(*b*) American composers cannot obtain in Great Britain, France, Belgium or the German Empire any royalties on perforated rolls cut in those countries from the compositions of such American composers.

Therefore, if this were the construction placed upon our law, the *American public would be taxed* for the benfit of the British, French, Belgian and German composers, and as no *reciprocal* rights are granted to our composers the citizens or subjects of those countries would be entitled to use the American compositions *free.*

Can an American Congress intended such a result? This country has been long committed to the doctrine of *protection.* If our legislature has ever shown any intent to discriminate it has always been a *discrimination in favor of the home product* as against the foreign product. In fact, the taxation of and the discrimination against the foreign product has been for many decades a cardinal principle of our policy. Can it be said, therefore, that the Congress of 1891, which passed the McKinley tariff bill, could by any possibility have intended a complete reversal of that policy, and intended to tax this country for the

benefit of the foreign composer and publisher without any *reciprocal* right being granted to the native composer?

It may be said that it was in the power of President Harrison, under the second subdivision of Section 13 of the Act of 1891, to require reciprocal arrangements as regards copyright. The very fact that such reciprocal arrangements were not entered into shows one of two things, viz.:

(*a*) That the governments mentioned *would not* enter into reciprocal arrangements, because they knew that the other was more favorable to the interests of their own citizens or subjects; or

(*b*) That President Harrison and his advisers were convinced that the copyright laws in those countries were identical with ours.

The first alternative necessarily involves a conclusion that President Harrison was ignorant of the effect of both our law and the Berne Convention, because it is entirely beyond belief that *he* would knowingly assent to a *discrimination in favor of the foreign product.*

The other is unquestionably the only reasonable assumption, viz., that President Harrison knew of the Berne Convention and its effect, believed that those countries were bound by its provisions, and hence intended to give the citizens and subjects of those countries exactly the same rights which those countries gave our citizens, *and no more.* If our laws gave our citizens a monopoly of making sound records or sound-reproducing devices, he knew it must give the same monopoly to *their* citizens or subjects as soon as he made a proclamation. He knew that *their* citizens or subjects did not have such a monopoly at their homes, and knew, therefore, that *our* citizens could not have such a monopoly at their homes. In entering

into the arrangement with those countries, therefore, and in making the proclamations he *must* have believed that *our* law, as far as sound-reproducing devices were concerned, was on all fours with the conclusion of the Berne Convention, viz., the copyright did not extend to mechanical devices for producing musical airs.

It is therefore earnestly contended on behalf of the appellee that the decision of the Circuit Court of Appeals, affirming that of the Circuit Court, in these cases, was right and should be affirmed, and that the conclusions of this court in affirming such decree should definitely fix the status of perforated rolls as not subject to copyrights upon the musical compositions which are rendered audible by means of them.

And in response to some of the contentions advanced by the appellant, attention is further asked to the *"Points in Reply"* on the following pages.

POINTS IN REPLY.

POINTS IN REPLY.

MODE OF MAKING PERFORATED ROLLS.

1. Appellant undertakes to support the proposition that the perforated sheet is a copy of the staff notation by the evidence in the record that the staff notation is used by the cutter or arranger of the perforated roll in making the latter. That is, that he consults the staff notation in order to determine how to cut the perforated roll.

This is entirely beside the question. A machine for doing a certain sort of work is necessarily contrived in view of the work to be done.

Here is a piece of art tapestry,—a beautiful picture produced in a loom by the control of the pattern card, which is a perforated card operating upon the same principle as the perforated rolls by which musical instruments are controlled to produce audibly musical compositions. The tapestry is a picture produced in thread instead of with paint. It is copyrightable, and it is copyrighted, let us assume. The artist has made a drawing or sketch of his picture, and the maker of the controller card for the Jacquard loom to produce the picture in web with colored threads properly interwoven, must consult the sketch minutely, ruling it off into fine squares the size of the mesh of the fabric into which the picture is to be woven, noting the color that falls in each of these squares and perforating his card to control the thread of that color for its appearance in each proper square. The consultation of

the sketch by the card maker is minute to the last degree. *Does this fact* render the perforated card a *copy* of the picture?

It might, indeed, render the maker liable for contributory infringement, because the card produces, and is made solely for the purpose of producing, a copy of the copyrighted tapestry picture.

But before this deduction can apply to the perforated music roll it must be first determined that the audible music,—the succession of sound waves,—the music in the air,—which is the product of the perforated roll, constitutes a copy, in the statutory sense, of the copyrighted musical composition. But this was the ultimate proposition, to support which the subordinate proposition under consideration was advanced. This assumption, therefore, would be begging the question or reasoning in a circle.

If this suit were brought under Sec. 4966 for public performance of musical composition, the seller of the perforated roll selling it for the express purpose of such public performance might be held a contributory infringer. But that is, of course, entirely irrelevant to any issue in the present suit, in which public performance is not even charged, to say nothing of the lack of proof that the rolls in question were sold expressly for public performance.

SPECIAL MUSIC NOT PLAYABLE BY HAND.

2. The appellant points out that certain music which cannot be played by hand at all on account of the limitations under which the human performer labors in operating a keyed instrument, can be played by automatic instruments controlled by perforated sheets, and that for such music the staff notation would have little or no commercial value and would not be in demand for sale because it would be useless for a performer to buy the notation of the music which he could not play; and that the only form in which multiples of anything relating to such music can be sold is the perforated sheet, which is the controller for playing them on automatic musical instruments.

From this it is argued that the copyright on the staff notation of such music should be treated as covering the perforated sheets, since otherwise the composer will have no benefit, or but slight benefit, of the copyright.

The argument is fallacious.

The staff notation of a musical composition of the character suggested—incapable of being played by hand of one person—like every other staff notation, has two functions. The first function—of conveying the musical sense directly to the mind—it can perform only for a sufficiently trained musician. The second function—of instructing the player what keys to strike—it can perform for one only sufficiently trained to read it for this purpose. It may be that the number of persons able to derive the sense of the music directly from the score and able therefore to find value in the staff notation of music of this class, may be too small to adequately repay the composer by means of the income which he would derive from selling the staff notation to such musicians.

But a like thing might be true of a book explaining how to perform certain chemical or electrical or other scientific experiments which would be exceedingly interesting to a large number of persons to witness, but wholly uninteresting to all but a few of them to read. Appellant's reasoning would require that the copyright on a book detailing such experiments should be extended to cover the apparatus for performing them, since without such apparatus and without the actual performance, the explanation would be of small interest and the book would have no extended sale. One man might buy the book, and understanding it, might buy the apparatus, and performing the experiments by means of the apparatus might entertain thousands at a dollar a head.

Why, it might be asked, should not the writer of the book describing the apparatus and the experiments have the revenue from the experiments themselves when performed for the entertainment of those who would not have comprehended the book and would not buy it?

The cases seem to be entirely parallel. The writer of the book, not being the inventor of the apparatus, can derive no revenue from its sale or use. He has neverthe less devised the experiments to be performed with this apparatus. His genius is the source of the pleasure or instruction which the experiments will afford.

The composer has produced a piece of music which only the perforated roll can play, but which thousands can enjoy when it is played, but he is not the inventor of the perforated roll for playing it, and so can derive no revenue from its sale or use as a piece of mechanism.

His staff notation is the description of the perform ance which the perforated roll will make. He sells that staff notation as the scientist sells his book, and one pur-

chaser, by means of that description, constructs the apparatus—the roll and the machine—which will play the music, and derives the revenue from the sale of that apparatus, just as the purchaser of one of the scientist's books, following the descriptions it contains, constructs and operates the apparatus for the experiments it describes.

It is not a question whether the composer and the scientist—the one who devises the musical composition and the other who devises the scientific experiments—should be compensated for the pleasure or profit which he affords or instructs others how to obtain, *but whether the copyright law provides for such protection.*

The scientist writes the book, and can do no more. The musician writes his score, and can go no further. Congress can perhaps enact a statute to give each of them something more than the monopoly of multiplying copies—the scientist of his book describing how to perform his experiments—the musician of his musical composition, which is also a writing describing by symbols how to produce his music. But until Congress does enact this "something more," whatever it should be, there is no more warrant for reading "something more" into the provision for copyright of the musician's musical composition than into the corresponding provisions for copyright of the scientist's book.

This court is asked, because of an instance rare in its occurrence, recent in its type, unknown to Congress when it passed the present copyright statute, to extend the statute so as to reach this rare instance. The mode of extension proposed, and the only mode that can be proposed, would make the statute include a thousand things not entitled in reason or justice to any protection.

The courts cannot distend or extend the statute for the particular instance and for that only. If they extend the words, "musical composition," to take in the intellectual product, and the word "copy" to take in the *mechanical instrumentality*, that extension will apply to a thousand things beside the one narrow limited instance which might be the motive for it. But when *Congress* undertakes to make the correction by statute, it can make it along as limited lines as justice and reason may dictate.

The case is precisely similar to that of dramatic composition. A dramatic composition is written primarily to be performed, and only incidentally to be read. Some dramatic compositions may have such literary character that they will be bought to be read, and so little dramatic quality that they will not be largely performed; but the dramatic composition whose value is in performance and not in reading, gets little protection from copyright statute. A hundred copies will supply all the actors who need it, and no one else wants it; but a million people will be glad to see it performed, and will pay high prices for their seats.

Here is a case in which the copyright on the *"book"* is inadequate to protect and reward the author. What happens when this is observed? Do the courts proceed to construe the copyright upon books as for the intangible intellectual product, so that *all* authors shall have monopoly of *all* means of profit from their writings, in order that the *dramatic* authors may get the revenue from *public performance*, which seems reasonable in their case alone? This is what the courts should have done according to the appellant's present contention in this case. But they did not. They waited for Congress to recognize the defect in the protection which the copyright gave to

dramatic writers, and to give to them by special statute the additional protection of monopoly of public performance which they alone needed, and which other book writers did not need.

This is the only safe way of proceeding. The *courts* could have extended the original statute so as to take in dramatic performance only by stretching all the fundamental words out of their natural significance—stretching the word "copy" so that it would have meant *imitation, production, presentation;* stretching the word "sale" so that it would have included the giving and taking of price for the hearing; extending the word "publish" so that it would have included every means of making public. These extensions of the statutory words, distorting them from their natural significance, would have taken effect not only upon dramatic compositions, but upon all the other sorts of "books" subject to the copyright; and such would be the effect if this court should follow the appellants in the interpretation of "musical composition" which they now seek to impose upon the statute.

The wrong or injury—if any wrong or injury does in fact exist in respect to the peculiar musical compositions suggested—is too insignificant in extent to justify judicial distortion of the statute for all purposes, as would be necessary in order to make it reach this new and very small class of instances, for which proper correction can be made without damage to the statute in other respects, by legislative action suitably amending the statute within the limits of constitutional power to meet what Congress may upon investigation find to be the requirements of justice and fairness, and within the purpose of the constitutional provision for the promotion of the arts and sciences.

IMPROVISATIONS.

3. The appellants make another point of improvisations, of which, by means of instruments made for the purpose, an automatic record may be made as the improvising musician plays upon the instrument, which record may be made by perforations upon the sheet so that the sheet may serve as a controller for an automatic instrument to cause the music to be reproduced precisely as the musician played it.

It might be answered that all this is beside the question, for the court is not considering here an improvisation nor a copyright of a perforated sheet, or any music whose first embodiment was in such a sheet. But the force which is intended to be given to the instance of improvisations is that if one perforated sheet—that of an improvisation—may be copyrighted and thereby monopoly obtained of making and selling such perforated sheets, all perforated sheets must be equally subject to copyright, the mode of their production, whether by calculation or translation from a staff notation, or by an automatic machine co-operating with an improvising musician, being immaterial.

The argument fails to distinguish between the question as to what things may be copyrighted, and the question as to what a copyright upon *a certain thing* may cover, between *copyrightability* and scope of the copyright monopoly.

Because one may copyright a digest of the decisions of this court it does not follow that a copyright of the full reports covers such digest, or that such digest would infringe such copyright upon the full reports; and the contrary is the fact.

The question whether a perforated roll may in any instance or in any sort of instance be proper subject-matter for copyright, to be obtained by filing such perforated roll as the copy called for by the statute, has no direct bearing upon any question arising in this case.

The appellants have assumed, or supposed, certain sorts of instances which might possibly arise, in which a composer's musical conception might be by him embodied in a writing employing a system of symbols similar to the perforations of these mechanical adjuncts of automatic instruments called "perforated rolls." If he offers such a writing, either with its symbols printed upon the paper or cut into the paper, for filing with the Librarian of Congress as an alleged copy of his musical composition, the Librarian of Congress has no power or function to declare that it is not a copy and to refuse it registration. He accepts the statement of the applicant for copyright, that what he offers for filing is a "musical composition." Such act of the Librarian has no value itself for determining even whether perforated rolls are copyrightable, and even this question is not material to any issue in the present cases.

If there are peculiar musical compositions which the composer prefers to write in a system of symbols, or to have written by a machine in a system of symbols resembling the perforations of the controllers of these automatic machines, and if he prefers to cut the symbols into the paper instead of merely marking them upon it, while the question of fact whether the sheet was a copy of the music to be read, or a piece of the machine to be used for its mechanical function, might in every such instance be raised and affect the validity of the copyright, it might be conceded without affecting any proposition

relied upon by the appellees in this case, that he might copyright the music in that peculiar form.

But there is no such case at bar, and the question is purely academic or speculative for any present purposes.

AMENDMENT OF SECTION 4966.

4. The appellants make much of the proposition that the revision of Section 4966 by Act of Jan. 6, 1897, which provides penalty for "any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained," uses the words "musical composition" as indicating something which may be publicly performed or represented; and they contend that this involves the use of the term as denoting the intangible intellectual product of the musician, since the tangible sheet or copy cannot be performed or represented; and that since the section which thus uses the term "musical composition" refers to it as that "for which copyright has been obtained," it follows that the previous sections of the statute, providing that, and prescribing how, copyright on musical composition can be obtained, must be understood as using the term "musical composition" in the same sense, and therefore in the intangible sense.

The error of law involved in this proposition is the assumption that the Legislature can by a later statute interpret the language of an earlier statute.

That a Legislature has no such power was early announced in U. S. Spreme Court in *Postmaster* v. *Early*, 25 U. S., 136, wherein it was said that—

> *"a mistaken opinion of the Legislature concerning a law does not make law."*

The question involved in that case was precisely whether a subsequent statute clearly implying a certain interpretation of a prior statute could have the effect to give to that prior statute the interpretation thus implied; and the Supreme Court denied that it could have that effect. The same doctrine is more fully announced in *Wheaton* v. *Peters* (Fed. Cases, 17,486), in which it is expressly said:

> "The Legislature has no right to impose upon the courts a construction of statutes previously passed. It is for the courts to construe the law. . . . He (the judge) is there to ascertain the true meaning and construction by his own judgment, and not by any subsequent legislation declarative of their meaning."

But the error in the interpretation of language which is involved in the proposition is not less obvious to the common mind than the error of law might be to the judicial mind.

To any person reading this section with mind open to interpret the language in the ordinary significance of the words employed, it will be apparent that the words "publicly performing or reading" employed in this Section 4966 are to be taken in connection with the phrase "musical composition" precisely as, for example, the words "publicly reading" would be taken in connection with the word "book" in a similarly constructed sentence—not as changing the meaning of the word "book" in any respect, but as describing the act which might be performed with respect to, or upon, or by means of, the "book."

When one says that he has "read publicly" to an audience one of Dickens' books he does not thereby indicate that he uses the word "book" in any other sense than it would have in the statement that he "bought" one of

Dickens' books for a dollar. When he buys a book he *gets* the tangible thing. When he reads the book he *reads* —uses for reading—the tangible thing. The particular use indicated in the latter case results in audible performance or vocalization, which is an intangible thing; or, to carry the thought a little farther, it results in putting the ideas of the book into the mind of the hearer and producing therein the intellectual conception which is intangible. But the "book" mentioned in the statement that it is "read publicly" is still the same tangible thing that it was when it was "bought for a dollar." So, when one says that he "publicly performed a musical composition," he means no different thing by the term "musical composition" than when he says he "bought" the musical composition for 25 cents. In either phrase, without change of significance, one might substitute the words "piece of music" for the words "musical composition," and in the statement of performance, just as definitely as in the statement of purchase, the tangible thing is referred to. Language is sufficiently elastic to permit the omission of words expressing the obviously intervening element of fact which might be expressed by more fully amplifying the statement thus:

> "I publicly performed the music contained in said musical composition."
>
> "I publicly read the story contained in Dickens' book."
>
> "I publicly represented the actions involved in the dramatic composition."

When the statement is thus amplified by supplying the obvious elision, it becomes clear in every instance that the thing referred to is the tangible thing, as it is even without supplying the elision when the thing referred to is a book.

Inasmuch, therefore, as all the other sections of the statute in which musical composition is mentioned obviously are constructed with the thought of the tangible and not of the intangible as the subject-matter of monopoly, and only this Section 4966, as amended in 1897, is susceptible of the interpretation involving intangible meaning for the words "musical composition," and inasmuch as, even in this section, the phrase bears easily the same interpretation as in all the other sections of the statute and in all the prior statutes, this section does not support the position taken by the appellants, and neither compels nor lends any color to the interpretation of the other sections and prior statutes as relating to the musical composition in the intangible sense contended for.

COMPLAINANT'S DEFINITION OF „COPY."

In pursuing this effort to substitute the non-statutory terms "record" and "musical composition" for the statutory word "copy," and to effect some sort of apparent alignment of its assertion of the intangible meaning of "musical composition," with the many pronouncements of the courts indicating that copyright is the exclusive right of multiplication of copies, the complainant has been driven to evolution of a definition of the statutory word "copy," which it considers broad enough to include perforated rolls, phonograph cylinders and disks, and all the other varieties of automatic devices for audible reproduction. This definition first appeared definitely in the argument of complainant's counsel in the Circuit Court of Appeals, and is substantially this:

"Copy," in the sense of the copyright statute, is any vendible multiple capable of imparting the intellectual product of the author to another.

And it was contended that perforated rolls, being vendible multiples capable of and constructed expressly for imparting the music (when associated with proper mechanism for that purpose) are "copies" within the meaning of the statute, and being unauthorized by the copyright owner are infringements.

A definition constructed to reach a particular case needs always to be examined with great care, and the true test, and one which the definition must endure in order to be accepted, is to apply it not merely to the particular case for which it was constructed, but broadly and generally to all cases covered by the statute."

The courts cannot stretch the words of the statute to reach a particular case without leaving them thus stretched for all purposes. The word "copy" cannot have the complainant's expanded definition for the purpose of protecting "musical compositions" against perforated rolls, and then shrink back to its ordinary meaning for other subjects of copyright.

As the proper test, therefore, it should be inquired whither this definition leads in respect to other subjects of copyright before it can be accepted as applying to this particular subject.

Take, for example, the subject of "book,"—the broadest term, or the term that has been given the broadest interpretation of any used in the statute to define subject-matter of copyright.

Mr. A has written a simple *story* book, to be read to a child. It is a simple, graphic story of the household dog and cat, the cow and the chickens. It is, however, so clearly graphic that being in effect a recital of certain situations and actions of these domestic characters, it creates in the mind of the child listening to it (or reading it) a

succession of pictures of these situations. It is, however, itself *mere letter press*—without a single picture.

Mr. B makes a *picture book*. The successive pictures show the successive situations and groupings of the domestic characters of the story,—the dog, the cat, the cow and the chickens,—and they are so clearly consecutive and suggestive that the imagination of the child, immediately upon seeing them in succession, constructs the story; how the cat chased the chickens, and the dog chased the cat, and the cow chased the dog, and the cat went up the tree, and the dog jumped over the fence, and the rooster mounted a post and crowed, while the avenging cow resumed her grazing. All this without a word of printed or uttered description.

Read to one child the printed book, without a single picture, and put into the hands of another child the picture book, without a single letter, and *both children will get the same story*. Indeed, in most instances, the child with the picture book will be telling the story first—will actually get the whole story from the pictures faster than it would from the words of description.

Does the picture book infringe the copyright of the printed book? Or, *vice versa*, would the printed book infringe the copyright of the picture book?

The complainant, it seems, would be obliged to answer yes.

We believe the court will feel obliged to answer no.

Yet it must be observed that the picture book and the letter press book are very much more nearly the same thing than the staff notation and the perforated roll. The two books both appeal to the same sense—of *sight*—and reach the mind through the same avenue and by stimulating the same faculty—*imagination*. The one child,

reading the letter press book, imagines the scenes described. The other child, reading the picture book, imagines the actions which intervene between the pictures.

But in the case of the staff notation and the perforated roll, the avenue to the mind is through different senses, and the perforated roll requires, beside, *the intervention of a machine*.

Take the case of a piece of statuary. The sculptor has obtained a copyright. For this purpose he files, not a copy of his statue, but a photograph of it (and the statute makes the obvious distinction between a photograph of a statue and a copy of it by requiring for copyrighting certain other things, as "book," that a copy be filed, whereas, for copyrighting a piece of statuary, it is not a copy, but a photograph that may be filed).

The sculptor's statue is photographed and the *photographs* are sold.

Do they infringe the copyright on the *statue?*

We know of no authority on precisely this point, but the doctrine in *Haenfstaengl* v. *Empire Palace Co.* (*ante,* p. 76), would point clearly to a negative answer. If to infringe a copyright on a painting or picture of any kind requires "something of the picture sort," to infringe the copyright on a statue would require *something of the statue sort;* and the photograph is not of the statue sort.

If there is any doubt as to the relation of the photograph to the statue, consider the supposition,—equally clearly within complainant's definition,—that a writer gifted with strong graphic power describes the statue with such detail and vividness that thereby a reader of the description of fairly good imaginative powers is caused to form a mental picture of the statue.

Does the description infringe the copyright on the statue?

Transpose the supposition: Let the description precede the sculpture. It is a symbolic figure and the description details the pose and attitude and grouping, if there be more than one figure, the facial expression, the emotion or sentiment depicted thereby,—all that enters into the intellectual conception; all that enters into the sculpture except the sculptor's *skill with the chisel.*

Now let a sculptor, having the skill and the imaginative grasp to fully apprehend the description, read it, absorb it, and work it out in the marble.

Has he infringed the description that was copyrighted?

This transposed supposition is more probable than the original. It is more likely, probably, that the sculptor will obtain the full conception from the description, than that the describer will be able to fully present in description what the marble shows to his eye; but the two cases each present the same question. Assuming that the sculptor does present in the marble what the writer describes; or that the writer so describes the marble as to produce a mental picture of it, and the complainant's definition of "copy" is met.

Respectfully submitted,

CHARLES S. BURTON,
MUNDAY, EVARTS & ADCOCK,
JOHN J. O'CONNELL,
Of Counsel for Appellees.